

**Exhibit 3**

# **Exhibit 3**

Pages 1-190

Exhibits 1-8

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
C.A. No. 1:20-cv-10002

\*\*\*\*\*

Emily Forsythe,

Plaintiff

vs.

Wayfair, LLC,

Defendant

\*\*\*\*\*

Videotaped Deposition of Matthew Witte

Tuesday, July 21, 2020

Via Videoconference

-----Kristen C. Krakofsky-----

Court Reporter

VERITEXT

(800) 227-8440

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<p>1 BY MR. GOODMAN:</p> <p>2 Q. Do I understand correctly, Mr. Witte, that</p> <p>3 you came to Wayfair in mid-2016?</p> <p>4 A. I started August 1, 2016.</p> <p>5 Q. What has been your career progression at</p> <p>6 Wayfair?</p> <p>7 A. I started as an associate director, which</p> <p>8 is a Level 5, in August of 2016. I was promoted to</p> <p>9 a director in, I believe, March of 2017, which is an</p> <p>10 L6, and have remained at that position.</p> <p>11 Q. And we're talking about the records in the</p> <p>12 industrial engineering division; correct?</p> <p>13 A. Yes.</p> <p>14 Q. What does industrial engineering do within</p> <p>15 Wayfair?</p> <p>16 A. Industrial engineering designs our</p> <p>17 facilities, designs the processes inside the</p> <p>18 facilities, looks after maintenance and upkeep of</p> <p>19 the operations, maintains the capital portfolio for</p> <p>20 all construction and new site launches related to</p> <p>21 the fulfillment space, essentially the warehousing,</p> <p>22 distribution, fulfillment centers that we have</p> <p>23 across the country.</p> <p>24 Q. Does warehousing, distribution -- I think I</p> <p>25 understand that. Does the fulfillment center</p> <p style="text-align: right;">Page 6</p>	<p>1 itself, does it?</p> <p>2 A. Wayfair is not a manufacturer. We do have</p> <p>3 some white label brands where other manufacturers</p> <p>4 will make the product for us with the Wayfair logo</p> <p>5 on the product. We are not actually a manufacturer.</p> <p>6 Q. Otherwise known as private label; right?</p> <p>7 A. Yes, private label.</p> <p>8 Q. When you were a director after March of</p> <p>9 2017 -- well, when you were an associate director,</p> <p>10 did you have supervision over multiple sites or just</p> <p>11 one site?</p> <p>12 A. You didn't really have site-level</p> <p>13 supervision. I had a function that I represented</p> <p>14 that served many sites. When I joined the company,</p> <p>15 there were, I want to say, four to five fulfillment</p> <p>16 centers that were operating. There's now fourteen.</p> <p>17 And then there's -- I think there's now 48 home</p> <p>18 delivery operations, which are small consolidation</p> <p>19 centers that are in major metropolitan areas. So</p> <p>20 it's always been a functional role. I was never in</p> <p>21 charge of a site.</p> <p>22 Q. So you're consulting -- the industrial</p> <p>23 engineering function consults with the site managers</p> <p>24 of each of these centers; correct?</p> <p>25 A. Yes, we do.</p> <p style="text-align: right;">Page 8</p>
<p>1 include call centers?</p> <p>2 A. No, it does not. I'm not involved in the</p> <p>3 call centers.</p> <p>4 Q. What does fulfillment center mean separate</p> <p>5 from warehouse and distribution?</p> <p>6 A. Sure. So they're just different names for</p> <p>7 the same thing. Traditionally, warehousing is</p> <p>8 storing and holding goods. Typically distribution</p> <p>9 is fulfillment to stores or other retailers, and</p> <p>10 typically fulfillment is business to consumer. So</p> <p>11 if you order a sofa, it ships out of one of our</p> <p>12 fulfillment centers.</p> <p>13 Q. I see.</p> <p>14 Is Wayfair all directly to consumer?</p> <p>15 A. Primarily, we are directly to consumer. We</p> <p>16 do have a business-to-business product line to</p> <p>17 outfit hotels, hospitals, and other businesses that</p> <p>18 are placing larger orders.</p> <p>19 Q. That was the part of the business that</p> <p>20 shipped items to Immigrations and Customs</p> <p>21 Enforcement in the incident which became somewhat</p> <p>22 controversial at Wayfair?</p> <p>23 A. That would have been the business-to-</p> <p>24 business channel, yes.</p> <p>25 Q. And Wayfair doesn't make any of the product</p> <p style="text-align: right;">Page 7</p>	<p>1 Q. What was the difference in your</p> <p>2 responsibility between associate director for seven</p> <p>3 months and then as director since March 2017?</p> <p>4 A. The difference in scope didn't change. I</p> <p>5 just did well in the role, and I was promoted.</p> <p>6 Q. Okay. Did you have subordinates and</p> <p>7 associate directors?</p> <p>8 A. I had, at the time I was promoted -- I</p> <p>9 started the team with myself and then had a small</p> <p>10 team, one or two people, within the first three</p> <p>11 months. And then I think when I was promoted I had</p> <p>12 a team of four.</p> <p>13 Q. And since you were promoted, have you been</p> <p>14 placed in supervision over more than four?</p> <p>15 A. Yes. Until recently, we did a</p> <p>16 reorganization to effectively kind of streamline the</p> <p>17 way we were running a couple of groups internally.</p> <p>18 At the height of the L6 position, I had around 168</p> <p>19 reports in the organization. Around 90 of them were</p> <p>20 front-line mechanics that actually took care of</p> <p>21 hardware in the buildings.</p> <p>22 Q. But they were also within the sphere of</p> <p>23 industrial engineering?</p> <p>24 A. They were in the maintenance function,</p> <p>25 which was part of industrial engineering at the</p> <p style="text-align: right;">Page 9</p>

<p>1 done -- have there been performance improvement 2 plans where employees weren't able to meet 3 expectations or if the employees were -- roles were 4 eliminated through reorganization, is that -- just 5 to clarify, do those count? 6 Q. They -- those are involuntary separations; 7 right? 8 A. I believe so. 9 Q. Okay. But -- if I may refer to 10 Ms. Forsythe as Emily, just for convenience? 11 A. Yeah. 12 Q. But Emily was not put on a PIP before she 13 was terminated; correct? 14 MS. KAPPELMAN: Object to the form of 15 the question. Emily resigned. 16 You can answer, Matt. 17 MR. GOODMAN: Object to sidebar, 18 Counsel. 19 MS. KAPPELMAN: You can answer, Matt. 20 MR. GOODMAN: That's a false 21 statement. 22 MS. KAPPELMAN: You can answer, Matt. 23 MR. GOODMAN: -- termination, as you 24 know. 25 BY MR. GOODMAN:</p> <p style="text-align: right;">Page 14</p>	<p>1 Q. Have you had any employees directly under 2 your supervision at the prior employers terminated 3 other than under a PIP or an alleged elimination of 4 the position? 5 MS. KAPPELMAN: Object to the form of 6 the question. You can answer if you understand it. 7 A. As I understand it, no. 8 Q. Have you ever been sexually harassed at 9 work? 10 A. No. 11 Q. Are you aware of any employees at Wayfair 12 who have been subject to unconsented touching by 13 another employee at Wayfair? 14 MS. KAPPELMAN: Object to the form of 15 the question. I'm going to direct you not to 16 answer, as it's not relevant to this matter. We can 17 go in front of the judge if we have to. 18 MR. GOODMAN: What's the objection to 19 relevance? 20 MS. KAPPELMAN: The objection is -- 21 whatever happened at Wayfair that is not -- that has 22 not happened to Ms. Forsythe or anybody in her chain 23 is not relevant to this action. It's beyond the 24 scope of discovery in this case, and I'm happy to 25 talk to a judge about it later.</p> <p style="text-align: right;">Page 16</p>
<p>1 Q. In any case, she was not on a PIP before 2 she was terminated, was she? 3 MS. KAPPELMAN: You can answer, Matt. 4 Object to the form of the question. 5 A. She was not on a PIP. 6 Q. And her position was not eliminated, 7 justifying her termination; correct? 8 A. The position was not eliminated. 9 Q. So besides Emily, have you -- has anybody 10 under you, directly or indirectly, been terminated 11 since March of 2017, other than through alleged 12 nonperformance of a PIP or elimination of their 13 position? 14 MS. KAPPELMAN: Object to the form of 15 the question. 16 You can answer, Matt. 17 A. No, they have not. 18 Q. How many other jobs besides -- how many 19 other employers besides Wayfair have you had since 20 you graduated college? 21 A. I've worked at four separate companies. I 22 started my career at United Parcel Service, then 23 went to a small business, Advanced Handling Systems, 24 around four years. Prior to Wayfair, I worked at 25 Gap, Inc. for seven-something years.</p> <p style="text-align: right;">Page 15</p>	<p>1 BY MR. GOODMAN: 2 Q. Did Ms. Forsythe make a report of 3 unconsented touching by Mike McDole to you? 4 A. She made a -- she made an email that I'm 5 sure you -- or a collection of documents that I'm 6 sure you have that she shared with me and asked me 7 not to share with anyone. It was only sent as a 8 backup. And when I read the document, deep in the 9 document there were references to touching. And I 10 immediately, against Emily's wishes, launched a case 11 internally at Wayfair with our talent management 12 partners to investigate. 13 Q. And there were multiple instances of 14 alleged unconsented touching in that email; correct? 15 MS. KAPPELMAN: Object to the form. 16 Matt, you can answer. Go ahead. 17 A. Per Emily's email, Emily stated that there 18 were. 19 Q. After the fact, she told you that she 20 appreciated the passing it on to HR; correct? 21 A. Initially, she was upset that I did. And 22 after about a week, she thanked me. 23 Q. Did you understand that that was because 24 she was unburdening herself of something that had 25 been troubling her?</p> <p style="text-align: right;">Page 17</p>

<p>1 Q. Have you disciplined or remonstrated 2 subordinates that do not include an executive 3 summary in communications with you? 4 MS. KAPPELMAN: Object to the form. 5 You can answer, Matt. 6 A. My team writes a lot of what we call 7 "narratives" where we explain a business objective 8 that we're trying to solve that is either a process 9 change or a capital, and typically there is an 10 executive summary at the front of that narrative 11 that explains what we're talking about overall, and 12 then we provide further details in the document. 13 Very common sense process for my team. 14 MR. GOODMAN: Object to 15 responsiveness. 16 BY MR. GOODMAN: 17 Q. Emily wrote communications like that from 18 time to time to you; correct? 19 A. Yes. 20 Q. And followed the format that you're 21 suggesting was typical; correct? 22 A. Yes. 23 Q. But this wasn't a memo about process change 24 or a capital change, was it? 25 A. No.</p> <p style="text-align: right;">Page 22</p>	<p>1 MS. KAPPELMAN: And I move to strike 2 that. It's not relevant. 3 Go ahead. 4 BY MR. GOODMAN: 5 Q. Did you discuss with Emily stress you were 6 experiencing in your position at Wayfair at any 7 time? 8 A. Yes. 9 Q. You told her from time to time that you 10 were feeling overwhelmed; correct? 11 A. Yes. 12 Q. Can you explain the supervisory 13 relationship between Emily and Mr. Witte -- I mean, 14 excuse me, and Mr. McKnight as compared to the 15 relationship between you and Emily? 16 MS. KAPPELMAN: Object to the form. 17 If you understand. 18 A. When you say "the relationship," do you 19 mean the reporting relationship? 20 Q. Reporting relationship, yes. 21 A. Sure. So I was Emily's direct manager when 22 she started on the team in 2017 until when Kory 23 started, which he started July 20th of 2018. And 24 about a week after Kory was enrolled, I believe I 25 made the organizational shift to have Emily report</p> <p style="text-align: right;">Page 24</p>
<p>1 Q. Was Emily the only employee at Wayfair who 2 had brought to your attention incidents of 3 unconsented touching of an employee of one sex by an 4 employee of the other sex? 5 A. Yes. 6 Q. Did you have any prior experience dealing 7 with that kind of situation as a supervisor? 8 A. At the employee level or at the 9 organizational level? 10 Q. Did you have any experience with dealing 11 with that as a complaint by a director and direct 12 subordinate? 13 A. No. This was my first time. 14 Q. Have you had any other occasion to address 15 that since? 16 A. No. 17 MS. KAPPELMAN: I'm sorry. What's the 18 question, Bob? Has he had any other occasion to 19 address what? 20 MR. GOODMAN: That at Wayfair since. 21 MS. KAPPELMAN: I'm going to direct 22 you not to answer. It has nothing to do with this 23 case. 24 MR. GOODMAN: Well, he already 25 answered.</p> <p style="text-align: right;">Page 23</p>	<p>1 directly to Kory after Kory had his first week of 2 onboarding. And then Kory took over as direct 3 manager. 4 Q. Right. And you were still a director. 5 What was his position? 6 A. Kory was a director. 7 Q. Okay. So he had the same title, but he was 8 a subordinate of yours? 9 A. Yes. 10 Q. And I think you said "July 2018." You mean 11 July 2019, don't you? 12 A. I'm sorry. Yes, July 20, 2019. Sorry if I 13 misspoke. 14 Q. Is there a human resources representative 15 at Wayfair that has been consistently assigned to 16 the industrial engineering group of which you are a 17 part in the last two years? 18 A. At what level? 19 Q. Why don't you just -- do you know who the 20 VP of HR has been during the last two years? 21 A. Yes. Kate Gulliver. 22 Q. All right. Have you dealt directly with 23 Ms. Gulliver on any HR matters in the last two 24 years? 25 A. I have not.</p> <p style="text-align: right;">Page 25</p>

<p>1 desks in Boston. I had a, quote/unquote, desk for a  2 period of time that would frequently get moved  3 because you weren't a permanent employee in the  4 Boston area.</p> <p>5 During Emily's time, when she lived in  6 Kentucky, I know she moved her hoteling desk around  7 at certain places.</p> <p>8 Q. What are you calling it?</p> <p>9 A. "Hoteling." Like a hotel desk. Just an  10 industry term.</p> <p>11 Q. Hoteling desk means what?</p> <p>12 A. It's a place you can work.</p> <p>13 Q. Okay. But she was not unique. There were  14 others who worked most of their time outside of  15 Boston but were Boston employees for that purpose;  16 correct?</p> <p>17 A. I think, just to clarify, Emily relocated  18 to Kentucky and was paid relocation money to move to  19 Kentucky -- which she found residence in Kentucky.  20 Emily, like myself, had other team members or direct  21 reports that lived in Boston. It was very frequent  22 for us to travel to Boston to go meet with our team  23 members to help them on projects, career  24 development.</p> <p>25 Q. Did some people under you not have Boston  Page 30</p>	<p>1 You can answer if you understand it.</p> <p>2 A. The connection to Boston in that similar  3 role?</p> <p>4 Q. Had the same connection to Boston that  5 Emily had with the desk in Boston, the stakeholders  6 in Boston, etc.</p> <p>7 MS. KAPPELMAN: Object to the form.</p> <p>8 You can answer, Matt, if you  9 understand it.</p> <p>10 A. As far as the engineering function that I  11 had, there was --</p> <p>12 Q. Right.</p> <p>13 A. Yeah. Let me think here a little bit. Are  14 you referencing, just to be specific, when Emily was  15 an employee in 2017 or 2018, or state now? Can you  16 just clarify?</p> <p>17 Q. Yeah. During her employment, what  18 percentage of the industrial engineering  19 organization had that connection with Massachusetts  20 that you're describing Emily had and that you may  21 have had for some period of time?</p> <p>22 MS. KAPPELMAN: Object to the form.</p> <p>23 A. I think in, like, 2017, it was probably  24 Emily and myself.</p> <p>25 In 2018, as we brought more senior leaders  Page 32</p>
<p>1 desks?</p> <p>2 A. Yes.</p> <p>3 Q. And do you know why some had Boston desks  4 and others did not?</p> <p>5 A. At the time, it was primarily based on the  6 scope of work and who your stakeholders were for  7 different aspects.</p> <p>8 So, like, as example, my maintenance  9 associate director, same level as Emily, did not  10 have a desk because his primary stakeholders were in  11 the field in the fulfillment centers.</p> <p>12 Q. And Emily's stakeholders -- to use that  13 term that you're using -- some of them or all of  14 them were in Boston?</p> <p>15 A. Some were. Many were in the field.</p> <p>16 Q. And who were the ones in Boston?</p> <p>17 A. The finance team; the sales and operations  18 planning team, which deals with inbound and outbound  19 volume forecast to all of our fulfillment centers.  20 And the talent acquisition teams are in Boston.</p> <p>21 Q. Okay. What percentage of the industrial  22 engineering employees had that connection to  23 Massachusetts?</p> <p>24 MS. KAPPELMAN: Object to the form of  25 the question.  Page 31</p>	<p>1 into the team -- remember the team went from 1  2 person to 160 in the course of three and a half  3 years. As we gained a bigger and larger team, there  4 was a larger percentage of people that would spend  5 more time in Boston to interact with all the  6 stakeholders.</p> <p>7 Myself personally, until COVID, I was in  8 Boston at least three to four days every month.</p> <p>9 Q. And how many of those people like Emily had  10 begun their work with Wayfair in Boston? Or what --  11 either numbers or percentages, if you know.</p> <p>12 A. And then took relocation packages to move?</p> <p>13 Q. Right. You know, began their employment in  14 Boston, and then after that lived in another  15 location.</p> <p>16 A. I think just Emily, because Emily asked to  17 move to Kentucky.</p> <p>18 Q. Has Wayfair published an  19 antidiscrimination, including sexual harassment,  20 policy since you've been there?</p> <p>21 A. Yes.</p> <p>22 Q. What does it say, generally?</p> <p>23 MS. KAPPELMAN: Object to the form of  24 the question.</p> <p>25 You can answer if you know.  Page 33</p>

<p>1 to protect her against further sexual harassment; 2 correct?</p> <p>3 A. I was, at the time, turning it over to our 4 talent management partners who are, you know, 5 trained in the right method and process to 6 thoroughly investigate and take care of all 7 employees.</p> <p>8 Q. And you wanted them to protect her against 9 any further sexual harassment; correct?</p> <p>10 MS. KAPPELMAN: Object to the form. 11 You can answer, Matt.</p> <p>12 A. I wanted them aware and to launch an 13 investigation into the process.</p> <p>14 Q. Well, you didn't want them to encourage 15 sexual harassment of Emily, did you?</p> <p>16 MR. GOODMAN: Object to the form; 17 asked and answered.</p> <p>18 You can answer again, Matt.</p> <p>19 A. No. I would never encourage anyone --</p> <p>20 Q. You wanted to make sure that any sexual 21 harassment ceased by reporting it; correct?</p> <p>22 MS. KAPPELMAN: Object to the form. 23 You can answer, Matt.</p> <p>24 A. Yes, that's correct.</p> <p>25 Q. Do you, as a man of 38 years, understand</p> <p style="text-align: right;">Page 38</p>	<p>1 more common when it occurs at workplaces than sexual 2 harassment of male employees?</p> <p>3 MS. KAPPELMAN: Object to the form of 4 the question.</p> <p>5 Matt, you can try to answer that if 6 you can.</p> <p>7 A. I think, like, if you look at data and 8 historical references, I think that would be, like, 9 an accurate societal statement.</p> <p>10 Q. All right. Since you've been at Wayfair, 11 has anybody under your supervision self-reported 12 discriminatory comments to either you or HR?</p> <p>13 A. Just to clarify, discriminatory in general 14 or sexual harassment related?</p> <p>15 Q. Discriminatory in general.</p> <p>16 A. Not discriminatory.</p> <p>17 Q. And Mr. McDole -- just to make the record 18 clear, Mr. McDole did not self-report any arguable 19 unconsented touching of Emily to you or anybody else 20 that you know of; correct?</p> <p>21 MS. KAPPELMAN: Sorry. Can you just 22 repeat that question? I lost it.</p> <p>23 BY MR. GOODMAN:</p> <p>24 Q. Just to make the record clear, Mr. McDole 25 did not self-report to you, or anybody that you know</p> <p style="text-align: right;">Page 40</p>
<p>1 that even in 2018, 2019, and 2020, females may have 2 a hesitation to report sexual harassment against 3 them?</p> <p>4 MS. KAPPELMAN: Object to the form of 5 the question.</p> <p>6 Matt, you can answer.</p> <p>7 A. If you're asking my opinion, it's tough for 8 me to answer. I'm not a female. I know there's 9 different circumstances at times.</p> <p>10 Q. Can you elaborate on what you mean by 11 "different circumstances at times"?</p> <p>12 A. Sure. I'm not in their shoes. I don't 13 fully understand what's mentally going on in their 14 minds when that's happening, or if that's happening.</p> <p>15 Q. Is it your experience in life that female 16 sexual harassment, to the extent it exists, may be 17 more common than male sexual harassment at work? In 18 other words, with the females being the targets of 19 sexual harassment versus males being the target of 20 sexual harassment.</p> <p>21 A. My personal work experience, this was the 22 first time I'd ever seen anything like this.</p> <p>23 Q. Well, I'm talking about your life 24 experience. Is it your understanding that sexual 25 harassment of females is more common -- probably</p> <p style="text-align: right;">Page 39</p>	<p>1 of, his concern that he may have touched Emily 2 without her consent?</p> <p>3 A. No.</p> <p>4 Q. Since you've been at Wayfair, has any 5 subordinate self-reported statements or conduct that 6 they were involved in because it was potentially 7 discriminatory?</p> <p>8 MS. KAPPELMAN: I'm going to object as 9 irrelevant.</p> <p>10 But go ahead, Matt. You can answer. 11 Maybe we can move on.</p> <p>12 A. As far as discriminatory comments?</p> <p>13 Q. Right.</p> <p>14 A. I did have one other.</p> <p>15 Q. Where it was a self-report?</p> <p>16 A. It was a self-report into a team lead, yes.</p> <p>17 Q. Okay. What was the nature of the comment?</p> <p>18 MS. KAPPELMAN: I'm going to direct 19 you not to answer.</p> <p>20 It's not relevant to this action. So 21 if you want to talk to the judge later about that, 22 we can. Beyond the scope of this case.</p> <p>23 Let me just do a little voir dire. 24 Did it have to do with Mr. McDole?</p> <p>25 THE WITNESS: It did not have to do</p> <p style="text-align: right;">Page 41</p>

<p>1 with Mr. McDole.  2 MS. KAPPELMAN: Did it have to do with  3 Ms. Forsythe?  4 THE WITNESS: Yes, it did.  5 MS. KAPPELMAN: Okay, never mind. I  6 withdraw my objection.  7 BY MR. GOODMAN:  8 Q. And what was it?  9 A. Emily had an employee in 2018, summer, that  10 asked what it would take to be promoted to an L3,  11 L4 -- from an L3 to L4, which at Wayfair is a  12 manager to a senior manager.  13 The complaint from Davina Heard -- is the  14 lady's name down in Atlanta, Georgia -- said that  15 Emily said people that are at the L4 in the company  16 have backgrounds from Harvard and other prestigious  17 universities and that it's really hard to be an L4.  18 Davina brought that to my attention and to  19 her manager, saying that she didn't feel  20 comfortable.  21 Q. That was not a report by Davina of a  22 comment that she made that -- that was not a  23 report -- a self-report by Davina of any comment  24 that she made, was it?  25 A. Before I answer, I can find out. I have</p> <p style="text-align: right;">Page 42</p>	<p>1 Q. No. I want to have the answer to this  2 question. Okay?  3 Was Davina telling you that she had made a  4 statement that she was worried could be viewed as  5 potentially discriminatory by Emily or by anyone  6 else?  7 A. Davina was concerned that she was  8 discriminated against by Emily.  9 Q. But she wasn't concerned that she made a  10 statement that could be viewed as discriminatory;  11 correct?  12 A. She considered it -- she escalated it to  13 her manager? Is that your question?  14 Q. No. Mr. Witte, I'm going to trying make  15 this indelibly clear, because I do not, quite  16 frankly, understand your confusion whatsoever.  17 Did Davina say to you that she had said  18 anything to Emily or to anybody else that she was  19 worried Emily or anybody else would view as a  20 discriminatory statement by herself, Davina?  21 A. I believe no, if I understand your  22 question.  23 Q. That was my question at the outset.  24 What is -- so is L4 a higher-level position  25 at Wayfair than an L5 or L6?</p> <p style="text-align: right;">Page 44</p>
<p>1 the emails.  2 Q. Davina wasn't telling you something she  3 said that --  4 (Interruption by the court reporter.)  5 BY MR. GOODMAN:  6 Q. Mr. Witte, my question was about a  7 self-disclosure. Do you remember that question?  8 A. Yes. Self-disclosure by Davina.  9 Q. Davina was not telling you about a comment  10 or statement that she made as being -- that she was  11 worried could be potentially viewed as  12 discriminatory, was she?  13 A. Yes, she was.  14 Q. What was the comment that Davina made that  15 she was worried could potentially be viewed as a  16 discriminatory comment by her, Davina?  17 A. Davina felt that she potentially was being  18 discriminated because she didn't go to a prestigious  19 school, even though Emily told her that we graduated  20 from Harvard and Cornell.  21 Q. What was the comment by Davina that she was  22 self-reporting -- that she was concerned could be  23 viewed as a comment -- as a discriminatory statement  24 by herself, that is, Davina?  25 A. Am I allowed to look this up for you?</p> <p style="text-align: right;">Page 43</p>	<p>1 A. No. L1 is a junior associate, typically  2 fresh out of school, and an L6 and is a director  3 level -- or L10 is the highest, the two founders of  4 the company. So L10 is the most senior, L1 is the  5 most junior. Actually, there's also an L0, just to  6 clarify.  7 Q. Did you talk with Emily about her statement  8 about educational credentials?  9 A. As in reference to Davina?  10 Q. You said Davina claimed there was a  11 statement made about educational credentials for  12 certain level positions; right?  13 A. Yes.  14 Q. Did you discuss that with Emily?  15 A. I did discuss that with Emily, told her it  16 was unacceptable.  17 Q. Okay. Do you remember what she said?  18 A. I believe Emily said that her words were  19 twisted, and that's not what she meant.  20 Q. Okay. Were there graduates -- since you  21 mentioned two schools, at least, were there Harvard  22 and Cornell graduates in L3 or L4 -- I forget  23 whether it was L4 positions which were discussed,  24 but I recall L4.  25 Were there, in fact, at Wayfair, graduates</p> <p style="text-align: right;">Page 45</p>



<p>1 of those institutions who were L4?</p> <p>2 A. I mean, Emily was an L4 from Cornell, and I</p> <p>3 know -- I'm positive there's Harvard that are --</p> <p>4 yeah.</p> <p>5 Q. And was -- as Davina reported it to you,</p> <p>6 was the conversation about L4s?</p> <p>7 A. The conversation was what does it take to</p> <p>8 become an L4, and I believe Emily referenced that</p> <p>9 L4s at Wayfair are a high position. Many typically</p> <p>10 have MBAs or come from schools such as Harvard and</p> <p>11 MIT and Cornell.</p> <p>12 Q. Is it true that many -- is it true that</p> <p>13 either a plurality -- let me restate the question.</p> <p>14 Is it true that many L4s at Wayfair have</p> <p>15 MBAs?</p> <p>16 A. In the corporate office, I'd say it's</p> <p>17 probably typical. Out in the field it's not. I</p> <p>18 wouldn't say it's, like, a requirement to have an</p> <p>19 MBA to be an L4. I have many employees on my team</p> <p>20 today that are L4s that do not have MBAs.</p> <p>21 Q. So some do, some don't?</p> <p>22 A. Yes. But it's not a requirement.</p> <p>23 Q. And more at headquarters than in the field?</p> <p>24 A. It's more common in headquarters, I think,</p> <p>25 to have the MBA, just because of the proximity to</p> <p style="text-align: right;">Page 46</p>	<p>1 BY MR. GOODMAN:</p> <p>2 Q. Did you discuss with Emily the substance of</p> <p>3 what she said to Ms. Heard, other than complain to</p> <p>4 Emily that it was inappropriate and have her say, "I</p> <p>5 was mischaracterized"? Was there any further</p> <p>6 discussion than that?</p> <p>7 A. I believe we discussed it for 30 minute on</p> <p>8 a phone call.</p> <p>9 Q. Do you have a recollection --</p> <p>10 A. I asked -- Emily was going down to meet</p> <p>11 with her to try to make sure things were smoothed</p> <p>12 out. I asked if Davina wanted to speak with our</p> <p>13 internal talent management.</p> <p>14 Q. My question was do you remember any further</p> <p>15 elaboration of what had absolutely been said than</p> <p>16 her saying what your understanding is is not</p> <p>17 correct?</p> <p>18 MS. KAPPELMAN: Object to the form of</p> <p>19 the question.</p> <p>20 Do you remember anything else about</p> <p>21 the conversation, Matt?</p> <p>22 A. No. I wasn't in the room for the</p> <p>23 conversation.</p> <p>24 Q. And did Emily say anything -- did you and</p> <p>25 Emily talk about it, other than your saying --</p> <p style="text-align: right;">Page 48</p>
<p>1 all the schools in the Boston area.</p> <p>2 Q. But Ithaca is not near Boston; right?</p> <p>3 A. No. I'm grouping in Ivy League colleges</p> <p>4 when I say that.</p> <p>5 Q. And Philadelphia is not near Boston, is it?</p> <p>6 A. I would guess Philadelphia is about a</p> <p>7 four-hour drive.</p> <p>8 Q. Actually, more like six, but...</p> <p>9 A. Yeah, probably.</p> <p>10 MS. KAPPELMAN: Okie dokie.</p> <p>11 BY MR. GOODMAN:</p> <p>12 Q. Did you and Emily discuss what Emily</p> <p>13 recalled saying to Ms. Heard specifically, or did</p> <p>14 you leave it as the discussion that you've already</p> <p>15 testified?</p> <p>16 A. I remember discussing that it was</p> <p>17 inappropriate. It wasn't consistent with our values</p> <p>18 as a company.</p> <p>19 Emily, I believe, made a trip down with</p> <p>20 herself and then her -- another person from the</p> <p>21 team, met with talent management. And then Davina</p> <p>22 actually resigned shortly thereafter to seek</p> <p>23 alternate employment.</p> <p>24 MR. GOODMAN: Object to</p> <p>25 responsiveness.</p> <p style="text-align: right;">Page 47</p>	<p>1 (Interruption in the proceedings.)</p> <p>2 THE VIDEOGRAPHER: The time is now</p> <p>3 11:07, and we're going off record.</p> <p>4 (Recess taken.)</p> <p>5 THE VIDEOGRAPHER: This is the</p> <p>6 beginning of Tape 2. Time is now 11:12. Back on</p> <p>7 record.</p> <p>8 BY MR. GOODMAN:</p> <p>9 Q. Other than your hearing from Ms. Heard,</p> <p>10 telling Emily that what Ms. Heard reported was</p> <p>11 inappropriate, and Emily saying what you heard from</p> <p>12 Ms. Heard was not a correct characterization of the</p> <p>13 conversation, was there any further discussion about</p> <p>14 the substance of the conversation between Ms. Heard</p> <p>15 and Ms. Forsythe?</p> <p>16 A. Yes, we did discuss it.</p> <p>17 Q. What did Emily tell you she had told</p> <p>18 Ms. Heard?</p> <p>19 A. I actually found the email. Can I -- I had</p> <p>20 no idea how the emails -- I'm happy to read it to</p> <p>21 you from Davina to Emily, what Davina's statement</p> <p>22 was.</p> <p>23 Q. No. I'm asking what did Emily say to you</p> <p>24 about the way that the conversation went?</p> <p>25 A. Emily said that she didn't characterize</p> <p style="text-align: right;">Page 49</p>

<p>1 that -- sorry. She said that she didn't say those 2 things to Davina, that she wouldn't have said that 3 you can only be an L4 by coming from a school like 4 Harvard or having a top-tier MBA. 5 Q. Did you talk with any HR representative 6 about this event? 7 A. Yes. Her manager -- Davina's manager at 8 the time, Steven Grimes, who reported to Emily, per 9 my direction, did meet with talent management, and 10 they asked Davina if she wanted to take it any 11 further. And at the time she said no. 12 Q. Okay. Did anybody tell you -- did anybody 13 from HR ever tell you that there was a legal aspect 14 to either the characterization of the conversation 15 by Ms. Heard or by Ms. Forsythe? 16 MS. KAPPELMAN: Object to the form of 17 the question. 18 You can answer, Matt. 19 A. I had Steven Grimes meet with the talent 20 management team and document everything -- because 21 Davina resigned shortly after -- to make sure that 22 it was accurately represented on record. 23 Q. Did anybody from HR tell you that they 24 thought there was a legal issue to the 25 characterization of the conversation by either</p> <p style="text-align: right;">Page 50</p>	<p>1 A. It's virtual training. It's fairly 2 thorough. 3 Q. Is it HR people on video? Is it multiple 4 choice exams? What is it? 5 A. It's both of those. It's reading, it's 6 assuming situations around what could be foreseen as 7 sexual harassment, off-conduct jokes, what's 8 appropriate, what's inappropriate. It runs you 9 through many quizzes and different tests to evaluate 10 situations. 11 Q. So one aspect of it is what constitutes 12 sexual harassment; right? 13 A. Yes. 14 Q. And that can include unconsented touching; 15 correct? 16 A. Yes. 17 Q. It can include comments negatively 18 stereotyping females; correct? 19 A. Yes. 20 Q. It can include bullying of females; 21 correct? 22 MS. KAPPELMAN: Did you say 23 "bullying"? 24 MR. GOODMAN: I said bullying, yes. 25 MS. KAPPELMAN: I'm going to object to</p> <p style="text-align: right;">Page 52</p>
<p>1 Davina Heard or Emily Forsythe? 2 MS. KAPPELMAN: Object to the form. 3 You can answer, Matt. 4 A. Not me directly. 5 Q. And you're not aware of anybody else being 6 told that, are you? 7 A. No, I'm not. 8 Q. At Forsythe (sic), have you been given any 9 sexual harassment training? 10 A. Did you say have I been given any sexual 11 harassment training before Forsythe? 12 Q. Online training or in person training? 13 A. Sure. Throughout my entire career. 14 Q. I'm talking about at Wayfair. 15 A. I can't remember, but I believe so, yeah. 16 There was code of conduct and sexual harassment 17 training. 18 Q. But you can remember definitely being 19 trained at prior employers; correct? 20 A. Yes. 21 Q. At Wayfair, what training has occurred 22 about dealing with sexual harassment? 23 A. There's annual training. 24 Q. Is it in-person training in Boston? What 25 does it consist of?</p> <p style="text-align: right;">Page 51</p>	<p>1 the form of the question. It calls for a legal 2 conclusion. 3 Are you asking him to define sexual 4 harassment under the law, or what the training says? 5 MR. GOODMAN: I'll restate it. 6 BY MR. GOODMAN: 7 Q. Does the training indicate that sexual 8 harassment can include conduct such as disrespect by 9 a male of a female? 10 MS. KAPPELMAN: Object to the form of 11 the question. 12 If you understand it, Matt, you can 13 answer. 14 A. It's typically around actual sexual 15 harassment. So touching, unwanted passes, 16 mentioning things that aren't appropriate that are 17 sexually oriented. 18 I don't think it -- I think bullying is 19 under -- it's under different policy around 20 discrimination. 21 Q. So let me pull out, then -- ask more 22 broadly about sex discrimination. 23 There can be sex discrimination that is not 24 sexual harassment; correct? 25 MS. KAPPELMAN: Again, this calls for</p> <p style="text-align: right;">Page 53</p>

<p>1 end of June is Review Cycle 1. We typically start 2 the process of writing reviews for that cycle in 3 July. We deliver those reviews in August. And 4 subsequently from July until the end of December, 5 plus or minus a couple weeks based on year-end 6 calendar cycles. It's typically front half, back 7 half.</p> <p>8 Review writing and calibration occurs for a 9 month after the reviews are written by the managers, 10 and then reviews are delivered typically four to six 11 weeks after the review cycle starts.</p> <p>12 Q. So maybe -- probably -- probably February 13 those years?</p> <p>14 A. Typically it's February and then August --</p> <p>15 Q. Okay.</p> <p>16 A. -- is when they're actually delivered.</p> <p>17 But it's a thorough review cycle process 18 where you get stakeholder feedback, peer feedback, 19 upward feedback.</p> <p>20 Q. Did you make observation to Emily about the 21 psychological or mental stability of McDole?</p> <p>22 A. So I think when we -- stability may be 23 tough. He's a bit -- when I interviewed Mike -- so 24 just to clarify, when I interviewed Mike, there was 25 a -- like, a quirk in his personality.</p> <p style="text-align: right;">Page 58</p>	<p>1 2019 they started to have some challenges around -- 2 Emily would give a lot of tasks, and Mike would pick 3 some of the ones that he would want to do, is what 4 Emily would claim to me.</p> <p>5 Q. Did you ever follow up with McDole about -- 6 after you had discussions with Emily about what I 7 would call inconstancy with his projects?</p> <p>8 A. Mike was concerned he was being 9 micromanaged at the time, at least in March. And 10 then -- go ahead.</p> <p>11 Q. Did you ever talk with Mike about -- not 12 about the issue of the closeness of management, but, 13 to use your terms, doing what he wanted to do and 14 not doing what he didn't want to do? Did you talk 15 about that kind of problem?</p> <p>16 A. Not directly with Mike.</p> <p>17 At the time, it was an employee that needed 18 to get clear expectations from his manager.</p> <p>19 Q. Did you ever tell Emily whether or not you 20 had spoken to him about that problem of inconstancy 21 of projects?</p> <p>22 A. Did I tell Emily? I think I told Emily I 23 was going to talk to Mike and make sure I understood 24 his point of view to make sure it was fair.</p> <p>25 And just for what it's worth, I've</p> <p style="text-align: right;">Page 60</p>
<p>1 And I asked Emily about it, but Emily was a 2 big fan of Mike, had worked with him at Amazon, said 3 he would do great things, and assured that we 4 wouldn't have an issue and that he would -- he was a 5 worker, and he would come in and get a lot of work 6 done.</p> <p>7 Q. I understand that he could -- he could 8 demonstrate very good performance from time to time?</p> <p>9 A. I've never met anyone outwork Mike McDole.</p> <p>10 Q. That worked what?</p> <p>11 A. That would outwork Mike McDole.</p> <p>12 Q. So hours of work? Are you referring to 13 hours of work?</p> <p>14 A. Hours of work, deliverables that he was 15 able to achieve. Very dedicated.</p> <p>16 Q. You and Emily had discussions about lack of 17 consistency with completing some projects and not 18 completing others. Do you remember that?</p> <p>19 MS. KAPPELMAN: Object to the form.</p> <p>20 You can answer.</p> <p>21 A. Yeah. I think in -- let's see. Mike 22 started -- I want to say, like, October, September 23 of 2018, if that sounds correct.</p> <p>24 And then the first three months it was 25 great. Emily loved him. And then I think in Q1 of</p> <p style="text-align: right;">Page 59</p>	<p>1 experienced that quite often in teams, that managers 2 push to do things and people say, I can't get it all 3 done; I'm not successful. And we all talk about it.</p> <p>4 Q. But what Mike told you, in response to your 5 discussion with Emily and in your communicating that 6 discussion to Mike was, I think I'm being 7 micromanaged. Was that the substance of his 8 response?</p> <p>9 A. Yeah.</p> <p>10 Q. Does Wayfair have an employee violence 11 policy?</p> <p>12 A. Yeah. I mean, there's zero discrimination 13 of harassment and threats in general -- zero 14 tolerance.</p> <p>15 Q. There's zero tolerance; right?</p> <p>16 A. Yeah. Zero tolerance to all of that, yes.</p> <p>17 Q. Does it have an employee antiviolence 18 policy?</p> <p>19 MS. KAPPELMAN: If you know, Mike.</p> <p>20 Objection. Again, if you want a 21 30(b)(6) about all the policies, we're happy to 22 provide one.</p> <p>23 BY MR. GOODMAN:</p> <p>24 Q. Were you ever made aware or did you ever 25 get trained on an employee violence policy?</p> <p style="text-align: right;">Page 61</p>

<p>1 A. I want to say workplace violence training 2 is part of the antidiscrimination, antiviolence 3 training. 4 Q. Okay. That's probably the most typical 5 terminology: workplace violence. 6 A. Yeah, absolutely. 7 Q. How did you understand, based on that 8 training -- how broadly did you understand, based on 9 that training, that the notion of workplace violence 10 was understood at Wayfair? 11 MS. KAPPELMAN: Is that really the 12 question? Can the rephrase that, Bob? 13 BY MR. GOODMAN: 14 Q. What was the scope of conduct by employees 15 that, as you understand it based on your training, 16 came under the rubric of workplace violence? 17 MS. KAPPELMAN: Objection. You can 18 answer, Matt. 19 A. I believe it would be anything that's 20 threatening an employee's safety. 21 Just for what it's worth, I mean, we run 22 fulfillment centers with hourly employees. We've 23 had people get in fights at buildings. They've 24 had -- can be anything from a fight to the 25 discriminatory comments earlier around, you know,</p> <p style="text-align: right;">Page 62</p>	<p>1 You can answer, Matt. 2 A. Yes. 3 Q. So you never gave a written evaluation of 4 Mr. McDole? 5 A. No, I did not. 6 Q. Mr. McKnight may have given a written 7 evaluation of Mr. McDole; correct? 8 A. No, he would not have. 9 Q. Who would, since Mr. McDole came on, have 10 given him a written evaluation of the kind that you 11 gave Emily? 12 A. I think Emily gave one. 13 Q. Okay. 14 A. And I believe the next would have been 15 Arron Velarde, A-R-R-O-N, V-E-L-A-R-D-E. 16 Q. Okay. 17 A. And then most recently, Brian McCormick. 18 Q. And did Mr. Velarde have a common -- 19 (Indecipherable). 20 MS. KAPPELMAN: Did Mr. Velarde have a 21 what? 22 MR. GOODMAN: Common prior employer 23 with Mr. McKnight. 24 MS. KAPPELMAN: Common prior employer? 25 MR. GOODMAN: Yes.</p> <p style="text-align: right;">Page 64</p>
<p>1 like, inappropriate behavior, making criticisms 2 towards people. 3 Q. Did you think it was any -- did you think 4 it was anything other than conduct -- could conduct 5 be psychologically threatening and still be covered 6 by the workplace violence policy? 7 MS. KAPPELMAN: If you know, Matt. In 8 your opinion. 9 A. I think, in my opinion, yes. 10 Q. And at one point in the fall of -- in the 11 late summer to fall of 2019, Emily told you that 12 conduct of Mr. McDole toward her was something that, 13 at that point, had become psychologically 14 threatening; correct? 15 A. I don't know if she said "psychologically 16 threatening" in her words. 17 Q. Was that part of the substance of it, that 18 she was being overwhelmed by his conduct toward her? 19 A. I think the email that I received from 20 Emily was she felt she was being bullied. 21 Q. And that is one form of psychological 22 threat that could be covered by the workplace 23 violence policy; correct? 24 MS. KAPPELMAN: Object to the form of 25 the question.</p> <p style="text-align: right;">Page 63</p>	<p>1 A. Yes. I think they both worked at Tesla. 2 Sorry. I had to dig for that one. 3 Q. And Mr. McCormack is the current superior 4 of Mr. McDole? 5 A. Not as of this moment. They've 6 reorganized. He's under Derek Sparks now. 7 Q. During part of his employment with Wayfair, 8 was Mr. McDole living in Texas? 9 A. Yes. 10 Q. And Wayfair has a facility in Duncanville; 11 correct? 12 A. Duncanville? In Texas? 13 Q. Yeah. Where is the facility? 14 A. Yeah, sorry. Lancaster, Texas. About 20 15 miles south of Dallas. 16 Q. Sorry. Next town over. You wouldn't know 17 that, but... 18 Do you know who was the site director in 19 Lancaster? 20 A. Yes. 21 At the time when Mike worked there, or 22 right now? 23 Q. When Mike worked there. 24 A. Jim DeSimone. 25 Q. And who more recently?</p> <p style="text-align: right;">Page 65</p>

<p>1 A. Liz White.</p> <p>2 Q. Okay. Did you ever talk with Mr. DeSimone</p> <p>3 about Mike McDole?</p> <p>4 A. On a project level, or is Mike doing a good</p> <p>5 job, or --</p> <p>6 Q. I guess any nonstrictly performance-related</p> <p>7 conversations.</p> <p>8 A. Not that I recall, but...</p> <p>9 Q. Okay. I'm going to -- we're going to try</p> <p>10 the screen share here. Let me just hit it, and...</p> <p>11 I'm going to pull up Wayfair 195. That's</p> <p>12 the first page of the exhibit. It happens to be the</p> <p>13 only page in this Bates. Do you see that, sir?</p> <p>14 MS. KAPPELMAN: Not yet, not yet. But</p> <p>15 we do see that you're opening it.</p> <p>16 MR. GOODMAN: It says it's open.</p> <p>17 MS. KAPPELMAN: Click on it again, if</p> <p>18 you don't mind.</p> <p>19 Did you see it open, Bob?</p> <p>20 THE WITNESS: You may have to drag the</p> <p>21 window to your screen. You might have to drag it</p> <p>22 down.</p> <p>23 MS. KAPPELMAN: No. He just needs to</p> <p>24 click on it, actually, and then it'll open.</p> <p>25 THE WITNESS: I think it may have</p> <p style="text-align: right;">Page 66</p>	<p>1 Q. Do you recall this email from Ms. Forsythe</p> <p>2 to you -- from you to her? You acknowledge the</p> <p>3 email?</p> <p>4 A. I do remember it. And I only remember it</p> <p>5 because it was -- it was odd because I think Emily</p> <p>6 rated him very highly and then quickly changed the</p> <p>7 rating.</p> <p>8 Q. Okay.</p> <p>9 A. That's the only reason I remember it. It</p> <p>10 was -- he was doing really well, and then something</p> <p>11 happened. And then all of a sudden he wasn't, and</p> <p>12 she wanted to add a bunch of things to his review.</p> <p>13 MS. KAPPELMAN: Can we call this</p> <p>14 Exhibit 1, Bob?</p> <p>15 MR. GOODMAN: We can call it</p> <p>16 Exhibit 1, yes.</p> <p>17 MS. KAPPELMAN: Witte 1, thank you.</p> <p>18 (Witte Exhibit 1, email Bates-stamped</p> <p>19 Wayfair 195, marked for identification.)</p> <p>20 BY MR. GOODMAN:</p> <p>21 Q. And you told her, Mr. Witte, that she could</p> <p>22 edit his review if she wanted to edit it before it</p> <p>23 was delivered?</p> <p>24 A. Yes.</p> <p>25 So the typical process at Wayfair is you</p> <p style="text-align: right;">Page 68</p>
<p>1 opened. It's probably on a different screen on his</p> <p>2 computer. He probably just needs to drag it onto</p> <p>3 the same one that the --</p> <p>4 MR. GOODMAN: I see. Okay. Let me</p> <p>5 make that a full screen. Now do you see it?</p> <p>6 THE WITNESS: Do you have a separate</p> <p>7 window? I assume you have two monitors? It's</p> <p>8 probably playing on another monitor. Drag the</p> <p>9 actual email onto this screen, and then it'll share</p> <p>10 this screen.</p> <p>11 MS. KAPPELMAN: Right click on it and</p> <p>12 drag it over.</p> <p>13 That's the problem with two screens in</p> <p>14 screen share: It will share it, but it will share</p> <p>15 it on the other screen.</p> <p>16 Can you guys go off the record, and</p> <p>17 we'll help him get this up.</p> <p>18 THE VIDEOGRAPHER: The time is now</p> <p>19 11:37. Back off record.</p> <p>20 (Recess taken.)</p> <p>21 THE VIDEOGRAPHER: The time is now</p> <p>22 11:47, and we're back on record.</p> <p>23 BY MR. GOODMAN:</p> <p>24 Q. Okay. Mr. Witte, can you see Wayfair 195?</p> <p>25 A. Yes, sir.</p> <p style="text-align: right;">Page 67</p>	<p>1 write a review. A group of kind of</p> <p>2 cross-collaborative team group read everyone's</p> <p>3 reviews. We align reviews to make sure that there's</p> <p>4 consistent feedback across the organization, that,</p> <p>5 like, a manager can't say you're great while your</p> <p>6 direct reports would say you're terrible. You make</p> <p>7 sure that it's consistent and fair.</p> <p>8 And then once the initial review is</p> <p>9 reviewed by a broader panel, reviews do open up</p> <p>10 later to allow for edits to the review based on the</p> <p>11 rating.</p> <p>12 So this was after Emily wrote his initial</p> <p>13 review and submitted it. I don't remember, but I</p> <p>14 think she submitted him as exceeding expectations,</p> <p>15 and then she wanted to change it later.</p> <p>16 Q. Right. And she said -- could you read the</p> <p>17 second paragraph of her email, the one that begins</p> <p>18 with the word "Since." Read it into the record, if</p> <p>19 you would.</p> <p>20 A. Starting with the whole thing?</p> <p>21 Q. No. Just the paragraph that begins</p> <p>22 "Since."</p> <p>23 A. "Since submitting the review, Mike's</p> <p>24 performance has slipped and he's stopped working on</p> <p>25 his assigned projects."</p> <p style="text-align: right;">Page 69</p>

<p>1 Q. Okay. And when would she have submitted 2 the review for the preliminary look by others? 3 A. It would have been in February. 4 Q. This was February 7th, so -- 5 A. Oh, the initial review would have been 6 completed in January. 7 Q. Okay. So it might have been several weeks 8 after the initial review was completed? 9 A. Yes. 10 Q. Okay. 11 A. But, like, again, the only reason I 12 remember this email specifically is that in January, 13 Emily would tell me verbally how great Mike was 14 doing, how many projects he did at peak, he's a 15 workhorse. 16 Emily stated in -- like, I'm just 17 referencing -- the only reason I remember this email 18 is that Emily was applauding how well Mike was 19 working in January around the review cycle. 20 I believe, during this review cycle, Mike 21 had rated himself a one. Emily, I think, was rating 22 like a two, which is a very high bar at Wayfair. 23 And then after, like, several weeks, this 24 hit and I found it kind of odd, which is -- 25 Q. The last statement she makes conforms with</p> <p style="text-align: right;">Page 70</p>	<p>1 Q. Is it fair to characterize this criticism 2 of Mr. McDole as you perform well, but you're not 3 team-oriented, and you can be insubordinate by just 4 refusing to do things you're assigned? 5 MS. KAPPELMAN: Object to the 6 characterization. The document speaks for itself. 7 She was very clear about her concerns. We all just 8 read them. We don't need your restatement of her 9 concerns from February of 2019. 10 MR. GOODMAN: Object to sidebar. 11 BY MR. GOODMAN: 12 Q. You can answer. 13 Let me restate it. 14 You were both talking about somebody who 15 could perform well when they actually performed 16 their assigned tasks; right? 17 A. Yes. 18 Q. Okay. But she observed some behaviors that 19 were related to things he did not do or want to do; 20 correct? 21 MS. KAPPELMAN: Objection. The 22 documents speaks for itself. 23 BY MR. GOODMAN: 24 Q. You can answer. 25 THE WITNESS: Lynn, am I allowed to</p> <p style="text-align: right;">Page 72</p>
<p>1 your evaluation of his objective performance and her 2 own that she gives a strong performance; correct? 3 A. Yeah. 4 Q. So did you understand that -- and 5 paragraph 1 talks about an assignment given to him 6 that he just hasn't done. Do you see that? 7 A. I see that, yes. 8 Q. And paragraph 2 talks about defensiveness 9 with constructive criticism? 10 A. Yes. I'm reading that, yes. 11 Q. Including a refusal to make changes in one 12 thing or another? That's the last line of 13 paragraph 2. Do you see that? 14 A. Yes, I do. 15 Q. And in paragraph 3, kind of refusal to use 16 an agreed template, a team template? 17 A. Yes. 18 Q. Okay. And then 4 is kind of the picking 19 and choosing the projects he's assigned to work on. 20 Do you see that? 21 A. Yes, I read that. 22 Q. And then 5, kind of difficult to have a 23 discussion with about projects they were working on 24 together. Do you see that? 25 A. Yes, I read that.</p> <p style="text-align: right;">Page 71</p>	<p>1 answer? 2 MS. KAPPELMAN: Yeah, yeah. You can 3 answer. He wants to know what his characterization 4 of the document says, so -- 5 A. Yeah. So I think, as I read this, Emily 6 had a top-down management style, that she would kind 7 of inform her team what she wanted to do and how I 8 wanted to do it. 9 Mike built many of these reports on his own 10 and had an opinion on how to actually do this. 11 Emily would say, "This is how I want to 12 change it." It wasn't always a collaborative 13 process. 14 So this is how I interpreted that, which is 15 where I didn't take -- that's why it surprised me. 16 At the same point in time, Mike was working 17 probably 70 or 80 hours a week, and Mike told me 18 that he was prioritizing to get done the work that 19 he could get done in verbal communication. 20 Q. So did you discuss this email with 21 Mr. McDole? 22 A. I don't think this email, because it was 23 still fairly early, and she was just updating his 24 review to reflect some comments and tendencies, 25 which I thought was fine. If she's provided</p> <p style="text-align: right;">Page 73</p>

<p>1 late August or early September, you had a 2 conversation with Mr. McKnight about a person named 3 Frances? I forget the last name. Do you recall 4 that?</p> <p>5 THE WITNESS: Do you want me to state 6 the name, Lynn?</p> <p>7 MS. KAPPELMAN: Sure.</p> <p>8 A. Frances Thunder, yes.</p> <p>9 Q. Do you remember discussing Frances Thunder 10 with Mr. McKnight in late August/early September in 11 reference to Emily?</p> <p>12 A. I do. I actually remember discussing it 13 with Kory, I remember discussing it with Frances, 14 and I remember discussing it with Frances's manager 15 Gor Zakaryan.</p> <p>16 Q. Did you discuss it with Emily?</p> <p>17 A. Yes. I believe, actually, Kory did because 18 she reported directly to Kory at the time.</p> <p>19 Q. Zakaryan is the name of the supervisor?</p> <p>20 A. Yeah. That was Frances Thunder's 21 supervisor at that time. And that's 22 Z-A-K-A-R-Y-A-N.</p> <p>23 (Clarification requested by the court 24 reporter.)</p> <p>25 THE WITNESS: Gor, G-O-R.</p> <p style="text-align: right;">Page 82</p>	<p>1 A. Yeah. So the email says, "Hi, Matt. Can I 2 talk to you first before we talk to Kory about my 3 switching teams? Do you mind if I start looking?"</p> <p>4 At the time, Emily had entertained to me 5 that -- trying to think. This is, like, 6 chronologically when she wanted to look at switching 7 to other teams internal to Wayfair, and she was also 8 exploring outside opportunities out of the company. 9 I asked her, you know, if it was anyone I knew 10 outside the company, and she said she wouldn't tell 11 me.</p> <p>12 Q. What do you mean, anyone you knew? Anyone 13 that she was talking to about --</p> <p>14 A. Like, was it Target? Was it Walmart? Was 15 it Amazon? Was it any of those -- like, just a 16 couple that I would know.</p> <p>17 Q. And were you also asking her about who she 18 was talking to within the company?</p> <p>19 A. I did not ask her what she talking about in 20 the company. I actually didn't -- I didn't prompt 21 this discussion. She prompted it on her own.</p> <p>22 Q. Do you remember, was there a discussion 23 prior to -- it sounds like can I talk to you first 24 before I talk to Kory. It sounds like you had 25 talked to her about the notion of switching teams.</p> <p style="text-align: right;">Page 84</p>
<p>1 BY MR. GOODMAN:</p> <p>2 Q. Who was Frances Thunder, or who is Frances 3 Thunder?</p> <p>4 A. Frances Thunder, at the time, was part of 5 the sales and operations planning team. She was the 6 lead for high-volume events back then, so she was 7 responsible for coordinating and orchestrating -- I 8 think coordinating and having a view -- a visibility 9 on capacity projects, available racking and storage 10 space across our fulfillment center network.</p> <p>11 Q. I'm going to show you what has been marked 12 as Exhibit 3, which is Wayfair 555.</p> <p>13 (Witte Exhibit 3, email from 14 Ms. Forsythe to Mr. Witte Bates-stamped Wayfair 555, 15 marked for identification.)</p> <p>16 BY MR. GOODMAN:</p> <p>17 Q. Do you see that?</p> <p>18 A. Yes, I do.</p> <p>19 Q. Can you tell me what the context of that 20 email was from Emily to you?</p> <p>21 MS. KAPPELMAN: Before you do, for the 22 record, it's a September 10, 2019, email from 23 Ms. Forsythe to Mr. Witte, dated -- time-stamped 24 3:35:42 p.m.</p> <p>25 Go ahead, Matt.</p> <p style="text-align: right;">Page 83</p>	<p>1 Do you remember any call prior to September 10, 2 2019, about that switch?</p> <p>3 A. What day was September 10th? Was that --</p> <p>4 MS. KAPPELMAN: What day of the week?</p> <p>5 A. Yeah. I can't remember. I remember, like, 6 a Wednesday or Thursday I was in Boston. I remember 7 talking to Emily. I can't remember if this is what 8 prompted that discussion, or if it was another one.</p> <p>9 Q. I think it would have been a -- might have 10 been -- actually could've been on a Monday, because 11 the 19th --</p> <p>12 (Multiple parties speaking. 13 Interruption by the court reporter.)</p> <p>14 BY MR. GOODMAN:</p> <p>15 Q. Go ahead, sir.</p> <p>16 A. Emily was working at our capital 17 forecasting team. Kind of stood that up. We didn't 18 have a great process within the financial structure 19 to look at the capital that we had in the network, 20 where we were spending money. I knew that she had 21 interest in that work. She -- I believe she had a 22 bachelor's in finance or something else from 23 Cornell. But she had an MBA with a finance 24 concentration from Cornell, I think. And I knew 25 that she liked finance.</p> <p style="text-align: right;">Page 85</p>

<p>1 telling you that the investigation was closed.  2 A. Yes, that's correct.  3 Q. And then she was terminated a week later;  4 right? Her last day of work was September 23rd, a  5 Monday?  6 A. I think so. You know the exact dates. I  7 believe that's --  8 Q. And she worked that whole day; correct?  9 A. The 23rd?  10 Q. Right.  11 A. I don't actually remember.  12 Q. Do you know about the trip to Atlanta that  13 she was scheduled to take the next day,  14 September 24th?  15 A. I think she had a -- I think she had booked  16 a flight after she met with Trevor. I don't  17 exactly -- to be totally honest with you, before you  18 go down the path of questioning, from the 23rd to  19 the 24th, I didn't have direct discussions with  20 Emily.  21 Q. Say that again, please.  22 A. I did not have a direct discussion with  23 Emily on September 23rd.  24 Q. Did you have any discussion with her  25 after -- what was the last time you talked with</p> <p style="text-align: right;">Page 94</p>	<p>1 like, did we have feedback from her?  2 Q. Did you communicate all verbal complaints  3 about her -- that you characterize as verbal  4 complaints -- to her prior to August 14th?  5 A. Sure, yeah, absolutely.  6 Q. So you -- you're claiming that any verbal  7 complaint by another employee about her was made  8 known to her before August 14th?  9 A. Yes. We had verbal complaints that came in  10 that we talked about beforehand.  11 Q. Okay. And after August 13th, after she  12 made her complaint, any verbal complaints made prior  13 to August 14th or after August 14th, you requested  14 the employees put them in writing; correct?  15 A. We did.  16 Q. And these were complaints that didn't  17 overlap with any aspect of the chronology. In other  18 words, the chronology did not refer to her having  19 received verbal complaints from any particular  20 individuals.  21 MS. KAPPELMAN: Object to the form of  22 the question. I don't even understand it. But if  23 you're characterizing what the chronology says, the  24 document speaks for itself.  25 MR. GOODMAN: I'll restate it.</p> <p style="text-align: right;">Page 96</p>
<p>1 Emily, if you can recall?  2 A. It may have been the Thursday before. I  3 think I said hi in passing.  4 Q. You were both in Kentucky on the Thursday  5 before, the 19th?  6 A. Yes. From what I recall.  7 Q. Did you know that Mr. Shaffer and  8 Ms. Forsythe were going to talk -- were talking that  9 day?  10 A. No, I did not.  11 The actual investigation, when that  12 proceeded, was handled by talent management. I --  13 intentionally, the manager is not kept in the loop  14 of what's going on until the investigation is  15 concluded.  16 Q. Part of -- after the -- after Emily made  17 her complaint, her formal complaint in mid-August, a  18 number of people were asked about their experiences  19 with Emily; correct?  20 A. Yes. Or people had made verbal complaints,  21 and we asked them to document them.  22 Q. Prior to -- prior to August 13th when she  23 submitted the complaint, had any verbal complaints  24 by other employees been communicated to her?  25 A. Verbal complaints from other employees --</p> <p style="text-align: right;">Page 95</p>	<p>1 BY MR. GOODMAN:  2 Q. It was only after the formal complaint was  3 made in mid-August that verbal complaints previously  4 made or made after August 14th were requested to be  5 confirmed in writing; correct?  6 MS. KAPPELMAN: Object to the form of  7 the question. It's not clear still the way you  8 state it. I think I know what you're getting at,  9 but the way you ask is not clear at all.  10 BY MR. GOODMAN:  11 Q. Did you or anybody else at Wayfair ask,  12 after August 14th, that verbal complaints previously  13 made or made after August 14th be confirmed in  14 writing?  15 A. We did. But we were also -- we were  16 pulling together overall documentation of Emily's  17 performance in the prep to have a performance  18 improvement plan, and we pulled many old emails from  19 prior individuals who spoke about it.  20 There were issues in Parris, California;  21 Lathrop; interactions with our site in New Jersey.  22 All of that was getting documented into one form  23 that we could share with our talent partners for  24 documentation purposes.  25 Q. Did you -- how many people were in your</p> <p style="text-align: right;">Page 97</p>



<p>1 organization at this time?</p> <p>2 A. My entire organization at the time? I</p> <p>3 guess like 120 at that point in time, which probably</p> <p>4 80 were maintenance employees.</p> <p>5 Q. Right. So were all verbal complaints</p> <p>6 against any employee under -- in that group of 120</p> <p>7 people requested to be confirmed in writing?</p> <p>8 A. I never had any other employee that</p> <p>9 received this many verbal complaints.</p> <p>10 Q. And what verbal complaints before</p> <p>11 August 14th did you discuss with Emily?</p> <p>12 A. How she was disruptive.</p> <p>13 Q. From who?</p> <p>14 A. Oh, Arron Velarde; Genaro Bugarin, who is</p> <p>15 the West Coast facility -- or ran the West Coast</p> <p>16 region a long time ago. There was members on her</p> <p>17 team.</p> <p>18 Q. And who were they?</p> <p>19 A. So Steven Grimes and Davina Heard, who I</p> <p>20 referenced earlier. We had long discussions around</p> <p>21 that one. Joe Guardinio (phonetic), back to 2018,</p> <p>22 had issues with Emily's management style and we were</p> <p>23 able to smooth that out.</p> <p>24 Q. Any other verbal -- alleged verbal</p> <p>25 complaints against Emily that you discussed with</p> <p style="text-align: right;">Page 98</p>	<p>1 turn on a piece of sortation equipment, and she was</p> <p>2 dismissive to the operations team that that even</p> <p>3 mattered to them. There was just lots of examples</p> <p>4 of how, like --</p> <p>5 Yeah. So if your answer is directly did I</p> <p>6 have a conversation with Emily before anything came</p> <p>7 to me on August 14th around her attitude or</p> <p>8 perception of work, the answer is unequivocally yes.</p> <p>9 Q. My question specifically was everything</p> <p>10 which you regarded as a verbal complaint, did you</p> <p>11 bring that up to her before August 14th?</p> <p>12 A. I think the big ones we did. I'm not sure</p> <p>13 if it was every single complaint.</p> <p>14 Q. And were there any alleged verbal</p> <p>15 complaints after August 14th which you also</p> <p>16 discussed with her?</p> <p>17 A. The chronology is difficult. So during an</p> <p>18 investigation, we were not doing active performance</p> <p>19 management with Emily, to make sure that she didn't</p> <p>20 feel like it was a hostile work environment. But</p> <p>21 from the time the investigation started until Emily</p> <p>22 left the organization, her attitude got worse by the</p> <p>23 day and week.</p> <p>24 We would have a discussion around Frances</p> <p>25 Thunder, for example, that -- Frances thought she</p> <p style="text-align: right;">Page 100</p>
<p>1 Emily?</p> <p>2 A. Melissa Malik, Bill Ayres. Melissa Malik</p> <p>3 ran the East Coast fulfillment center region. Bill</p> <p>4 Ayres ran the building in New Jersey called</p> <p>5 Cranberry 3. Allan Lyall had issues and feedback.</p> <p>6 He is the head of supply chain today. There was a</p> <p>7 long list of people.</p> <p>8 Q. And your -- your testimony is that you --</p> <p>9 before August 14, 2019, you communicated to Emily</p> <p>10 every communication to you that you regarded as a</p> <p>11 verbal complaint about her?</p> <p>12 A. I think I would have. I mean, I want to</p> <p>13 say in, like, the June time frame I actually had a</p> <p>14 call with her and talked to her about her attitude</p> <p>15 and her perceptions of operations based on a lot of</p> <p>16 feedback.</p> <p>17 And I think the thing that was really hard</p> <p>18 for me -- Emily was a great employee for me in 2017</p> <p>19 and '18, so I had a ton of loyalty. I was a big</p> <p>20 Emily fan. But as she grew into the role over time</p> <p>21 and she started to get direct reports and as the</p> <p>22 pressure mounted, she had just become kind of</p> <p>23 condescending to people at times or dismissive.</p> <p>24 And there was a lot of examples. Like, we</p> <p>25 were going to shut the power off to a building to</p> <p style="text-align: right;">Page 99</p>	<p>1 was being bullied by Emily and not being responsive.</p> <p>2 We would tell Emily not to do that and that she had</p> <p>3 to apologize to Frances. And then moments later,</p> <p>4 Emily would send an email to Frances or a -- a</p> <p>5 Slack, I think was our internal text messaging</p> <p>6 service -- and say, "Why did you copy my manager? I</p> <p>7 can't believe that." Which we thought was further</p> <p>8 hostile work environment type scenarios.</p> <p>9 Q. So you don't think after August 14th you</p> <p>10 passed along any verbal critiques that --</p> <p>11 A. I personally didn't, but Kory was her</p> <p>12 manager. Kory absolutely did every day, every week.</p> <p>13 Q. Okay. All right. You're not aware of any</p> <p>14 other employee among the 120 under your direct or</p> <p>15 indirect supervision where verbal complaints were,</p> <p>16 in each case, asked to be confirmed in writing by</p> <p>17 the complaining party other than Emily; correct?</p> <p>18 MS. KAPPELMAN: Object to the form.</p> <p>19 Object to the form.</p> <p>20 If you know, Matt.</p> <p>21 BY MR. GOODMAN:</p> <p>22 Q. In 2018.</p> <p>23 A. And so is your question before we put</p> <p>24 someone on a performance improvement plan, if we ask</p> <p>25 for feedback from a collective set of employees to</p> <p style="text-align: right;">Page 101</p>

<p>1 help document so that we can articulate to the 2 employee where their shortfalls are? Is that your 3 question? 4 Q. No. Let me restate the question. 5 Who asked people who allegedly complained 6 about Emily to turn their complaints into writing in 7 August 2019? 8 A. I believe I did. 9 Q. Okay. 10 A. In charge of the overall function. 11 Very similar to -- we exited an employee in 12 New Jersey earlier this year for issues in not doing 13 his job, and we collected feedback from his peer 14 stakeholders around performance expectations to the 15 role, did they feel they were the right fit. Very 16 common process to collect feedback on someone. 17 Q. Did anybody beside you in your EIE 18 organization ask anybody to document complaints 19 against Emily in writing? 20 A. I'm sure Kory McKnight did because he was 21 her direct manager. 22 Q. Okay. And do you remember when the first 23 time you requested -- or when was the first time you 24 requested a verbal complaint about Emily to be put 25 into writing?</p> <p style="text-align: right;">Page 102</p>	<p>1 of all but the probative answer. 2 (Clarification requested by the court 3 reporter.) 4 MS. KAPPELMAN: What he liked. He's 5 objecting to all but the testimony he liked, 6 whatever that was. He doesn't like it when the 7 witness gives his own story. He objects to 8 responsiveness, which he won't be able to do at 9 trial, thank goodness. 10 MR. GOODMAN: If you want to -- 11 Counsel, Lynn, if you want to make predictions -- 12 (Disruption in the audio. Discussion 13 held off the record.) 14 THE VIDEOGRAPHER: The time is now 15 12:38, and we're going off the record. 16 (Recess taken.) 17 THE VIDEOGRAPHER: Time is now 12:58. 18 Back on record. 19 BY MR. GOODMAN: 20 Q. Did anybody inform you in August 2019 that 21 the complaint by Emily in mid-August required that 22 efforts be paused to begin some kind of performance 23 management exercise against her? 24 A. I think, because of retaliation, we were 25 told to -- yes, we were actually told to do that,</p> <p style="text-align: right;">Page 104</p>
<p>1 A. I think it's that end of August time frame, 2 which is when her performance really went downhill. 3 It wasn't just performance. Performance is 4 the wrong word. It was, like, hostility at work, is 5 almost the right phrase that I would use. It was, 6 like, combative with the operations team. Like, 7 every day I was getting called by my partners that 8 were at the similar director level. Like, every 9 day. Emily is not working well with us. 10 Q. It was after -- so it was like two weeks 11 after she made her complaint that you started asking 12 people to put their complaints in writing; correct? 13 A. Yes. But I think that's a separate thing, 14 to me, at least. There was a sexual harassment suit 15 that was going -- not suit -- complaint that was 16 going on that -- to be very clear, Kory and I fully 17 supported a thorough investigation of that, which is 18 why when we read the documentation, we turned it in. 19 There was a separate issue around 20 combativeness and aggressiveness at work that we 21 were trying to have a documented conversation with 22 Emily on, which is why we were collecting peer 23 feedback, so that hopefully she could understand 24 that feedback and address the situation. 25 MR. GOODMAN: Object to responsiveness</p> <p style="text-align: right;">Page 103</p>	<p>1 to -- not to pause it. We can collect it, we can 2 give her verbal feedback, but we couldn't start an 3 actual performance improvement plan. 4 Q. I'm sharing with you 590. Can you see 590 5 there? 6 (Witte Exhibit 5, email Bates-stamped 7 Wayfair 590, marked for identification.) 8 A. Yeah. 9 Q. This was an email sent after she complained 10 of retaliation; correct? 11 MS. KAPPELMAN: Let the record reflect 12 this is an email from Matt Witte to C. Stark dated 13 September 18, 2019, at 9:49:06 a.m. in response to 14 an email sent from Candace Smith to Matt Witte of 15 the same date, September 18, 2019. 16 Q. What was Ms. Smith talking about when she 17 said "anything with her"? 18 A. From what I remember chronologically as 19 well, the prior email shown to me said -- I had 20 asked if Candace had -- if we completed the sexual 21 harassment investigation, and she said we had. And 22 we were pulling together documentation to start a 23 performance improvement plan. 24 And then Candace informed us that Emily had 25 filed a retaliation complaint, and we were not able</p> <p style="text-align: right;">Page 105</p>

<p>1 to proceed forward with that plan.  2 Q. And she did not tell you between mid-August  3 and mid-September that the discrimination complaint  4 required itself a pause?  5 MS. KAPPELMAN: Object to the form of  6 the question.  7 You can answer, Matt.  8 A. We were told we were verbally allowed to  9 tell Emily anything, and we just weren't allowed to  10 launch -- we weren't allowed to have her on a formal  11 performance improvement plan during the  12 investigation.  13 Q. And you used the word "launch". Why?  14 A. What word did I say?  15 Q. Launch.  16 MS. KAPPELMAN: Launch.  17 A. Oh, launched. I had started. Just a --  18 find another synonym for started. Begin.  19 Q. So the same pause that -- HR did not tell  20 you to pause -- put a pause on anything with her in  21 mid-August, only you did that in mid-September;  22 correct?  23 A. No. They told us that we could not do a  24 formal performance improvement plan during any type  25 of sexual harassment investigation. We also could</p> <p style="text-align: right;">Page 106</p>	<p>1 Q. And whatever pause that you were supposed  2 to take in August didn't prevent you from doing that  3 in late August, did it?  4 A. That wasn't -- the way that it was  5 explained to us is we were not allowed to have those  6 discussions with Emily.  7 Q. But you could -- behind the scenes, you  8 could do as much as possible, just so as long as you  9 didn't talk to Emily; right?  10 MS. KAPPELMAN: Object to the form of  11 the question.  12 You can answer, Matt, again.  13 A. We were documenting the complaints that we  14 had consistently coming in from Emily during that  15 time frame.  16 Q. Without telling her that you were doing so?  17 A. I mean, I think even Emily knew. Like, we  18 had the Frances Thunder incident, for example,  19 during that time frame. That was all documented in  20 email. And even Emily had back and forth with  21 emails.  22 Q. But all these requests to put allegedly  23 verbal complaints into writing, you were not telling  24 Emily that you were doing that when you were doing  25 that; right?</p> <p style="text-align: right;">Page 108</p>
<p>1 not do a performance improvement plan while this  2 investigation was going on.  3 Q. But that didn't prevent you from asking  4 people in late August to put allegedly verbal  5 critiques into writing.  6 A. We were allowed to verbally talk to Emily.  7 We weren't allowed to give anything to Emily. Or we  8 weren't supposed to give anything to Emily.  9 Q. But, again, you didn't view whatever you  10 were told in August to prevent you from turning what  11 you claim were verbal criticisms into written  12 criticisms; correct?  13 MS. KAPPELMAN: Object to the form of  14 the question.  15 You can answer if you understand it.  16 A. We were doing -- we were -- so I think,  17 just to be clear, the comments weren't solicited in  18 general. The comments were coming in to us in  19 emails and calls and other things, so we did  20 document everything that was going on with Emily.  21 Q. But you didn't just document what you claim  22 were communications by others. You actually asked  23 people to put previously allegedly only verbal  24 complaints into written form; correct?  25 A. Yes, we did.</p> <p style="text-align: right;">Page 107</p>	<p>1 A. I don't recall. I don't remember telling  2 her --  3 Q. Okay.  4 A. -- specifically we would do that.  5 Q. Okay.  6 A. It would've been like Emily telling --  7 maybe not this case with Mike. But Emily documented  8 conversations on Mike without Mike knowing.  9 Q. This was an email from somebody named  10 Victor Davis; correct?  11 A. You have to share your screen. I cannot  12 see it.  13 MS. KAPPELMAN: Yeah, you're not  14 sharing it, Bob.  15 MR. GOODMAN: Right there, Victor  16 Davis. I'll make this Exhibit 6. The prior one was  17 Exhibit 5.  18 (Witte Exhibit 6, email from Mr. Davis  19 to Mr. Witte Bates-stamped Wayfair 585 and 586,  20 marked for identification.)  21 BY MR. GOODMAN:  22 Q. 585 and 586 are an email to -- from  23 Mr. Davis to you; correct?  24 A. Yes.  25 Q. And this was a solicited email; correct?</p> <p style="text-align: right;">Page 109</p>

<p>1 A. Yes.</p> <p>2 Q. So let me clarify something. When the</p> <p>3 complaint of retaliation was made and you were told</p> <p>4 you had to put a pause on anything, did that mean</p> <p>5 that after that time you couldn't request -- you</p> <p>6 couldn't solicit written statements?</p> <p>7 MS. KAPPELMAN: Object to the form of</p> <p>8 the question. You've mischaracterized what he was</p> <p>9 told.</p> <p>10 Go ahead and say again, Matt, what</p> <p>11 they told you.</p> <p>12 A. We didn't get further clarification at that</p> <p>13 level.</p> <p>14 Q. Well, let me just -- I'll bring that back</p> <p>15 up.</p> <p>16 A. Yes, September 18th.</p> <p>17 When was the investigation concluded, if</p> <p>18 you can refresh my memory? Was it 9/13 on the prior</p> <p>19 file?</p> <p>20 Q. That was September 16th. You're being told</p> <p>21 that on September 16th.</p> <p>22 So to go back to this --</p> <p>23 MS. KAPPELMAN: Is this the Victor</p> <p>24 email?</p> <p>25 MR. GOODMAN: This is the Victor</p> <p style="text-align: right;">Page 110</p>	<p>1 And I said that we internalized</p> <p>2 that -- me being Kory, myself, and other members on</p> <p>3 the broader operations team -- that we couldn't</p> <p>4 start a performance improvement plan with Emily</p> <p>5 until the retaliation complaint was completed.</p> <p>6 Q. "Anything" is an absolute statement. The</p> <p>7 opposite of anything is nothing; right?</p> <p>8 MS. KAPPELMAN: Oh, my God. Object to</p> <p>9 the form of the question.</p> <p>10 Matt, you can answer these crazy</p> <p>11 questions.</p> <p>12 A. I guess anything means that. But this is</p> <p>13 used in a phrase of statements similar to other</p> <p>14 words that are used in phrases of statements.</p> <p>15 This was meant from Candace as a</p> <p>16 performance improvement plan when I verbally spoke</p> <p>17 with her on the phone. And you can clearly tell</p> <p>18 this was sent from her phone and text message. It</p> <p>19 wasn't a well-written email that I would interpret</p> <p>20 it exactly.</p> <p>21 Q. And she invited you to talk about it the</p> <p>22 next morning; correct?</p> <p>23 A. Yes.</p> <p>24 Q. Did you just -- did you talk to her about</p> <p>25 it, or did you just operate on your, quote,</p> <p style="text-align: right;">Page 112</p>
<p>1 email. Let me put the prior one up for a second.</p> <p>2 BY MR. GOODMAN:</p> <p>3 Q. What was it -- looking at 590, which is</p> <p>4 Exhibit 5, what was it that you were not supposed to</p> <p>5 do because of the retaliation complaint?</p> <p>6 A. Start a performance improvement plan.</p> <p>7 Q. In your understanding, you could continue</p> <p>8 to solicit written statements?</p> <p>9 A. No one told us we were not allowed to do</p> <p>10 that. I don't know if we should have or should not</p> <p>11 have, but that was not explicitly stated.</p> <p>12 Q. Well, the word "anything" is very broad, is</p> <p>13 it not?</p> <p>14 MS. KAPPELMAN: Object to the form of</p> <p>15 the question. Is the question whether the word</p> <p>16 "anything" is broad? Is that the question you just</p> <p>17 asked?</p> <p>18 MR. GOODMAN: It is.</p> <p>19 MS. KAPPELMAN: Object to the form of</p> <p>20 the question.</p> <p>21 You can answer, Matt.</p> <p>22 (Indecipherable. Clarification</p> <p>23 requested by the court reporter.)</p> <p>24 THE WITNESS: Mr. Goodman asked me if</p> <p>25 "anything" meant any conversations with Emily.</p> <p style="text-align: right;">Page 111</p>	<p>1 internalized interpretation?</p> <p>2 A. I believe I called her. I believe. Or I</p> <p>3 called -- I think I called Candace.</p> <p>4 Q. And you talked to her before this email or</p> <p>5 after this email?</p> <p>6 A. Well, before the email was the sexual</p> <p>7 harassment complaint had concluded. We had</p> <p>8 documentation pulled together to review with Emily.</p> <p>9 Q. So you didn't talk with her about the pause</p> <p>10 until after this email was sent?</p> <p>11 A. Pause. On this email?</p> <p>12 There was two pauses around performance</p> <p>13 improvement plans for Emily, just to clarify. There</p> <p>14 was an original one during the sexual harassment</p> <p>15 investigation, and there was a second one around a</p> <p>16 retaliation complaint against Kory.</p> <p>17 During those time frames, we were</p> <p>18 instructed not to launch a formal performance</p> <p>19 improvement plan, but we were told we were allowed</p> <p>20 to give verbal improvement around improving her job</p> <p>21 for fear of her saying that we were retaliating</p> <p>22 against her as an employee.</p> <p>23 Q. So you didn't think the reference to</p> <p>24 "anything" was significant. You thought it meant</p> <p>25 the same very specific thing that you had thought it</p> <p style="text-align: right;">Page 113</p>

<p>1 meant before, just the PIP.</p> <p>2 MS. KAPPELMAN: Object to the form of</p> <p>3 question.</p> <p>4 If you understand what he means by "it</p> <p>5 wasn't significant," go ahead and answer.</p> <p>6 A. I think I would say a pause on anything</p> <p>7 meant the performance improvement plan with Candace,</p> <p>8 and that's what we verbally spoke about.</p> <p>9 Q. And a pause on anything meaning -- that was</p> <p>10 a conclusion you reached both in August and then</p> <p>11 again in September?</p> <p>12 A. That meant a performance improvement plan.</p> <p>13 We can still -- this was a verbal conversation. I'm</p> <p>14 doing my best to recollect this. But from what I</p> <p>15 remember almost a year ago was that we were told not</p> <p>16 to put anything formally in writing around a</p> <p>17 performance improvement plan, but we can certainly</p> <p>18 document and discuss with Emily any issues around</p> <p>19 her performance and expectations to fulfill her job</p> <p>20 duties.</p> <p>21 Q. Do you know why -- did she send you a</p> <p>22 similar email in September -- in August? Excuse me.</p> <p>23 A. I don't think so. Because at that point in</p> <p>24 time, Emily -- Emily really started to go kind of</p> <p>25 downhill in the end of September. And the early</p> <p style="text-align: right;">Page 114</p>	<p>1 advice from either Ms. Smith or Mr. Shaffer in</p> <p>2 August, it was specific to you can't impose a PIP on</p> <p>3 her; correct?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And then in September, the word used</p> <p>6 was "anything with her." And you're saying you</p> <p>7 didn't take that as meaning anything different than</p> <p>8 what you had been told in August?</p> <p>9 MS. KAPPELMAN: Asked and answered.</p> <p>10 You can answer again, Matt. Truly,</p> <p>11 same thing. Go ahead. Answer.</p> <p>12 A. Yeah. The way that you're reading</p> <p>13 "anything" here is a -- you're assuming that the way</p> <p>14 that I'm internalizing anything, just to be clear,</p> <p>15 is stop all communications with Emily Forsythe,</p> <p>16 cease and desist, do not talk to her, do not engage.</p> <p>17 That is not the way that we internalized</p> <p>18 this because she was still working under our</p> <p>19 direction managing multimillion dollar projects, and</p> <p>20 we had to give her feedback on performance.</p> <p>21 What I internalized this, based on my</p> <p>22 verbal conversations with Candace, is that we were</p> <p>23 not allowed to launch an official performance</p> <p>24 improvement plan.</p> <p>25 Q. Did you take her invitation to talk about</p> <p style="text-align: right;">Page 116</p>
<p>1 issues that were, you know, coachable started to get</p> <p>2 severe where every day we were getting called by our</p> <p>3 stakeholders, at the end of August and early</p> <p>4 September, especially around, you know,</p> <p>5 confrontational or aggressive behaviors towards</p> <p>6 their sites. Those emails came to us.</p> <p>7 Q. You were not told to take a pause in</p> <p>8 writing on anything, or using similar words, in</p> <p>9 August, even if you were told in this email in</p> <p>10 September after the retaliation complaint; right?</p> <p>11 A. Yeah. But I don't think anything</p> <p>12 represented what we internalized that as at the</p> <p>13 time.</p> <p>14 Q. Okay. So did you get verbal advice that</p> <p>15 you -- I guess you got verbal advice from Ms. Smith</p> <p>16 or Mr. Shaffer in August that you had to not pursue</p> <p>17 a PIP?</p> <p>18 A. Yes. But it did start in early August when</p> <p>19 we found the sexual harassment. Again, Kory and I</p> <p>20 were advocating for Emily, which is why we turned in</p> <p>21 the -- you can't even say it's advocating. It's the</p> <p>22 right thing to do. But we wanted to see a thorough</p> <p>23 investigation happen because if anything did happen,</p> <p>24 we wanted it to come out.</p> <p>25 Q. So my question is when you got verbal</p> <p style="text-align: right;">Page 115</p>	<p>1 it more in the morning?</p> <p>2 A. I think I answered you already on this, but</p> <p>3 I believe I did.</p> <p>4 Q. But you don't remember anything different</p> <p>5 than what you told me already?</p> <p>6 A. No. I believe that she told me that there</p> <p>7 was a retaliation complaint filed against Kory --</p> <p>8 I'm sure we're going to talk about that later in</p> <p>9 this session -- and that Emily had launched a</p> <p>10 complaint on retaliation against the sexual</p> <p>11 harassment.</p> <p>12 Q. But she didn't clarify what "anything with</p> <p>13 her" meant in that subsequent morning conversation;</p> <p>14 correct?</p> <p>15 A. If I -- I vaguely remember that it was --</p> <p>16 you cannot go on a performance improvement plan</p> <p>17 until this retaliation complaint is completed.</p> <p>18 Q. Okay. Did you talk with Mr. Shaffer about</p> <p>19 the issue of what the implications of her</p> <p>20 retaliation complaint were?</p> <p>21 A. No, I did not.</p> <p>22 Q. In August, had the instruction to not</p> <p>23 pursue a PIP come from both Shaffer and Smith or</p> <p>24 just one of them?</p> <p>25 A. I believe it was just Candace, because I</p> <p style="text-align: right;">Page 117</p>

<p>1 think Trevor was actually running the sexual 2 harassment investigation. 3 Q. All right. Can you see this one? 4 A. Sure can, yes. 5 (Witte Exhibit 7, email from 6 Ms. Forsythe to Mr. McKnight and Mr. Witte Bates- 7 stamped Wayfair 1265 and 1266, marked for 8 identification.) 9 BY MR. GOODMAN: 10 Q. I guess I didn't have to go back to the -- 11 Do you remember getting this email, which 12 is Exhibit -- 13 A. I do. 14 Q. -- Exhibit 7 at 1265 and 1266? 15 A. I do remember it. 16 MS. KAPPELMAN: So it's a 17 September 17, 2019, email from Emily Forsythe to 18 Kory McKnight and Matt Witte. 19 BY MR. GOODMAN: 20 Q. So Emily sent it to both you and 21 Mr. McKnight? 22 A. Yes. 23 Q. Did Emily discuss with you her initial 24 conversation with Mr. Witte when he became her 25 superior about him wanting to bring on more and more</p> <p style="text-align: right;">Page 118</p>	<p>1 conversation he'd had with Emily because he -- it 2 was almost like he was yelled at and screamed at. 3 And Kory is a pretty strong personality, and I knew 4 something was wrong. 5 And then he said that Emily drove over 6 after he had conversations with Kelly and basically 7 erupted on him in the room, you know, pressuring 8 him, pushing on him. 9 And then this email came out about an hour 10 and a half later from Emily's private email. 11 Q. Did you talk with him about going behind 12 her back? 13 A. Yeah. It's not behind her back. He -- so 14 to be clear, Kelly, who's still employed on my team, 15 or employed on Kory's team, was having difficulties 16 managing a project in Lathrop to where Emily would 17 give her direction against what the site wanted, and 18 it was creating conflicts of scheduling how to do 19 things. So Kelly reached out directly to Kory to 20 seek assistance to actually resolve the issue. 21 And a similar issue from the site. The 22 site was very happy with Kelly's performance, happy 23 with the program, the way they were managing it, had 24 a difficult time with Emily. 25 So Kelly reached directly out to Kory</p> <p style="text-align: right;">Page 120</p>
<p>1 employees and suggesting he needed to have her not 2 be on his team to do that? 3 A. No. 4 MS. KAPPELMAN: Object to the form of 5 the question. I think you meant did she talk to you 6 about a conversation with Mr. McKnight. This is 7 Mr. Witte. 8 BY MR. GOODMAN: 9 Q. Yes, I did. Her initial conversation with 10 Mr. McKnight and that aspect of it. Did she talk to 11 you about that? 12 A. That he was trying to replace her with 13 Walmart employees? Is that what you're asking me 14 specifically? 15 Q. Yes. Did she ever talk to you about that 16 before getting to this? 17 A. No. 18 Q. Did you talk with Mr. McKnight about this 19 after you both received it? 20 A. I did. I actually walked in on the room. 21 I think Kory, Emily, and myself were in our 22 Erlanger, Kentucky building because there was a 23 large project going on. 24 From what I remember, walking in on Kory, 25 he was almost shattered and shaking from the</p> <p style="text-align: right;">Page 119</p>	<p>1 because she felt she was in a hard spot, in this 2 specific email, which is why he reached out 3 directly. 4 If you're also asking me is it common to 5 call one or two levels down to make decisions with 6 junior working members of the team, it's entirely 7 common at Wayfair. I do it all the time. I had a 8 conversation yesterday with an L3 employee under an 9 L5 under an L4 and gave him direction on project 10 work. It's very common. 11 MR. GOODMAN: I object to 12 responsiveness. 13 BY MR. GOODMAN: 14 Q. Did you have a discussion with him of all 15 the specific issues that are -- of going behind her 16 back that are raised in this email? 17 MS. KAPPELMAN: Object to the form of 18 the question. 19 But go ahead and answer again. 20 A. There's not an objection internally at 21 Wayfair to talking to an employee's employees to 22 review project schedules, deliverables, decisions. 23 That happens all the time. 24 Q. I heard your nonresponsive answer. 25 MS. KAPPELMAN: What's nonresponsive</p> <p style="text-align: right;">Page 121</p>

<p>1 about that, Bob? I'm going to stop you there.  2 You've got to stop with that. Just because you  3 don't like what he said --  4 He's responding to you about whether  5 he talked to Kory about going behind her back. And  6 he said no, because that's not unusual. And he went  7 into detail about that and said how he did.  8 You're playing games, and you need to  9 stop. His answers are his answers.  10 BY MR. GOODMAN:  11 Q. Did you talk with Mr. McKnight about each  12 of the examples of that discussed in this email to  13 you and Mr. McKnight?  14 A. I'm happy to walk through each of these one  15 by one.  16 Q. Did you discuss it with Mr. McKnight after  17 you got the email? That's my question.  18 A. Can we -- you're asking me to give you a  19 blanket answer. Can we review each of the issues,  20 and I can talk through the appropriate response?  21 Q. No. I'll move on.  22 How soon after you got this email did you  23 have any discussion with Mr. McKnight about it?  24 A. Probably within an hour of receiving it.  25 Q. How many conversations with Mr. McKnight</p> <p style="text-align: right;">Page 122</p>	<p>1 did he dispute saying the things that are attributed  2 to him in the last two sentences of the -- of that  3 paragraph beginning, "You went on to state."  4 A. I know Kory. I know Kory well. Kory was  5 in the military, Kory worked for large automotive  6 companies, Kory worked for large aerospace, Walmart,  7 large companies.  8 They train you as a manager what you're  9 allowed to say and not to say. I know very well  10 that Kory would not have said that directly to  11 Emily. Kory does not ever make a case that we can  12 hire and fire people without involving talent  13 management.  14 Q. So did he actually deny saying the things  15 attributed to him in those last two sentences to  16 you?  17 A. Yes.  18 Q. He said, I didn't say either of those  19 things?  20 A. Yes.  21 MS. KAPPELMAN: Asked and answered.  22 You can answer again.  23 BY MR. GOODMAN:  24 Q. So is it your -- was it your assumption  25 that he never spoke with Emily at any time about the</p> <p style="text-align: right;">Page 124</p>
<p>1 about this email did you ever have?  2 A. How many times did we talk about this  3 email?  4 Q. Yes.  5 A. I don't know. Several.  6 Q. Look at the last two sentences in the next  7 to last paragraph beginning, "You stated that you  8 don't think I'm a good fit." Do you see that?  9 A. I do.  10 Q. Did Mr. McKnight dispute that he said those  11 things to Emily?  12 MS. KAPPELMAN: Hold it, hold it.  13 When you say "those things," you're talking about  14 the sentence that begins, "You stated" --  15 MR. GOODMAN: The same last two  16 sentences of the next to last paragraph of the  17 email, yes. "You stated" and "you continued," those  18 two sentences.  19 MS. KAPPELMAN: Read those two  20 sentences before you answer, Matt.  21 A. I also think those two sentences are  22 missing the broader context of the entire paragraph  23 from Emily.  24 Q. I'm not asking you about the -- I'm not  25 asking you about the thing as a whole. I'm asking</p> <p style="text-align: right;">Page 123</p>	<p>1 prospect of removing her from his team?  2 A. Not in the context of just firing her,  3 like, without a proper engagement of a talent  4 management person, if that's what you're asking.  5 Q. The last two sentences of that paragraph do  6 not say that he told her he was going to do all that  7 without involvement of talent management, do they?  8 MS. KAPPELMAN: The document speaks  9 for itself.  10 A. Exactly as it says.  11 MR. GOODMAN: Object to nonresponsive  12 comment.  13 BY MR. GOODMAN:  14 Q. There was a reference to Ms. Frances  15 Thunder. Do you see that in the middle of the last  16 paragraph?  17 A. Yes.  18 Q. And Emily specifically speaks to that by  19 saying, "This is not the case, and Frances and I  20 have a good working relationship."  21 Do you see that?  22 A. I do see that.  23 Q. Did you talk with Frances on September 17th  24 or any day after September 17th to verify that?  25 A. From what I remember of Frances, they did</p> <p style="text-align: right;">Page 125</p>

<p>1 not have a good working relationship. Frances is 2 fairly amenable to a lot of people, and that was one 3 that did not work out well for Frances and Emily. 4 MR. GOODMAN: Object to 5 responsiveness. 6 BY MR. GOODMAN: 7 Q. On or after September 17, 2019, did you 8 call Ms. Thunder and attempt to verify that 9 statement by Emily? 10 MS. KAPPELMAN: Asked and answered. 11 You can answer again, Matt. Just 12 because he objects doesn't mean it's the wrong 13 answer. Just give your testimony. 14 A. I do not remember specifically calling 15 Frances after this date. 16 Q. All right. And Emily's statement indicates 17 that Mr. McKnight had told her that she needed to 18 mend things with Frances, and then claimed that she 19 had not done that; right? 20 A. Yes. 21 Q. And she was disputing that; correct? 22 A. Per her email, that's how I read that, yes. 23 THE WITNESS: Can I speak? 24 MS. KAPPELMAN: There's no question 25 pending, Matt. So unless you're answering the</p> <p style="text-align: right;">Page 126</p>	<p>1 Q. Correct? 2 A. Yes. 3 MS. KAPPELMAN: And just so the record 4 reflects what we're looking at, it's an email from 5 Mr. Witte to Chris Stark dated September 19, 2019. 6 BY MR. GOODMAN: 7 Q. And you talked about not wanting to do a 8 PIP; correct? 9 A. At this point in time, Emily had become 10 hostile to work with, was having difficult 11 discussions with all stakeholders, and we were 12 looking for guidance around what we could do and how 13 we could do it. 14 MR. GOODMAN: Object to 15 responsiveness. 16 MS. KAPPELMAN: What is not responsive 17 about that, Bob? 18 MR. GOODMAN: I'm preserving the -- 19 I'm preserving the objection. 20 MS. KAPPELMAN: No. What you're doing 21 is trying to bully the witness into not giving 22 answers you don't like, and we're not going to let 23 you do that. His testimony is -- his response is 24 his response. I'm not going to allow bullying. 25 MR. GOODMAN: I have a right to</p> <p style="text-align: right;">Page 128</p>
<p>1 question, there's no need to speak. 2 THE WITNESS: It's fine. It's around 3 Frances and engagement. There's emails around it. 4 BY MR. GOODMAN: 5 Q. Again, you don't remember speaking with her 6 on or after that date you got this email from Emily? 7 (Clarification requested by the court 8 reporter.) 9 BY MR. GOODMAN: 10 Q. I'm wondering if the last unsolicited 11 observation changes your testimony, that you do not 12 remember reaching out to Ms. Thunder on or after the 13 date of Emily's email. 14 MS. KAPPELMAN: Object to the form of 15 the question. 16 You can answer, Matt. 17 A. I don't recall if I spoke to Frances or I 18 didn't speak to Frances. 19 BY MR. GOODMAN: 20 Q. Looking at Wayfair 1273 and 1274, I'm not 21 sure that you're copied on all the emails. Do you 22 remember this series of emails? At least you 23 certainly -- I presume you remember the email that 24 begins at the bottom of 1273. 25 A. Sure.</p> <p style="text-align: right;">Page 127</p>	<p>1 preserve a -- 2 MS. KAPPELMAN: You don't have a right 3 to bully a witness because you don't like his 4 response. You don't have that right. 5 MR. GOODMAN: I have a right to object 6 to nonresponsive when I think an answer is 7 nonresponsive. 8 BY MR. GOODMAN: 9 Q. Why were you raising an issue of a -- 10 strike that. 11 Stark was then your boss? 12 A. Yes. 13 MS. KAPPELMAN: Matt, was Chris Stark 14 your boss? 15 A. Yes. I said yes. 16 Q. And you were told -- you had been told 17 several days earlier, maybe even a day earlier, that 18 you could not put her on a PIP in light of her 19 retaliation complaint; correct? That's your 20 interpretation; right? 21 A. No. That was the "anything." 22 Q. Right. That's your interpretation of 23 "anything." 24 A. My interpretation of that was we couldn't 25 put on her on a PIP until the investigation was</p> <p style="text-align: right;">Page 129</p>



<p>1 concluded.</p> <p>2 Q. Okay. Is that why the investigation</p> <p>3 took -- reportedly took about two hours?</p> <p>4 MS. KAPPELMAN: Object to the form of</p> <p>5 the question.</p> <p>6 BY MR. GOODMAN:</p> <p>7 Q. Do you know why the alleged retaliation</p> <p>8 investigation took hours, not even days?</p> <p>9 MS. KAPPELMAN: Object to the form of</p> <p>10 the question.</p> <p>11 A. Do I know -- I'm not in talent management.</p> <p>12 I'm not trained to do an internal investigation.</p> <p>13 Q. Have you ever heard of a -- have you ever</p> <p>14 been aware of any other discrimination or</p> <p>15 retaliation investigation besides those related to</p> <p>16 Emily?</p> <p>17 MS. KAPPELMAN: Objection; lacks</p> <p>18 foundation. I direct you not to answer. It has no</p> <p>19 relevance to this case.</p> <p>20 If you want to ask the investigator</p> <p>21 why it took --</p> <p>22 MR. GOODMAN: I'll restate the</p> <p>23 question.</p> <p>24 BY MR. GOODMAN:</p> <p>25 Q. At Wayfair, have you been aware of any</p> <p style="text-align: right;">Page 130</p>	<p>1 shared with Chris Stark, it was done.</p> <p>2 Q. Okay. So it would have been -- that would</p> <p>3 have been September 19th; right?</p> <p>4 A. Yeah. Whatever -- Thursday, September 19th</p> <p>5 at 1:18 I sent it to Chris.</p> <p>6 Q. That was the so-called background</p> <p>7 information; right?</p> <p>8 A. Yes. This was a summary of everything we</p> <p>9 had.</p> <p>10 Q. Had you been told at this point that the</p> <p>11 retaliation complaint had been investigated?</p> <p>12 A. I believe so.</p> <p>13 Q. What precipitated -- strike that.</p> <p>14 Did anybody ask you to put together this</p> <p>15 document?</p> <p>16 A. Did anyone internally in the company ask me</p> <p>17 and Kory to put this together?</p> <p>18 Q. Yes.</p> <p>19 MS. KAPPELMAN: I'm going to direct</p> <p>20 you, if it was legal counsel that asked you to do</p> <p>21 it, to identify that.</p> <p>22 If it wasn't, go ahead and answer all</p> <p>23 the questions he has about this.</p> <p>24 A. No, it was not legal counsel that asked for</p> <p>25 this, from what I recall.</p> <p style="text-align: right;">Page 132</p>
<p>1 other retaliation or discrimination investigation?</p> <p>2 A. I have not.</p> <p>3 Q. And who is Allan Lyall in relation to Chris</p> <p>4 Stark? Is that a subordinate or a superior?</p> <p>5 A. Superior.</p> <p>6 Q. And so Mr. Stark is writing Mr. Lyall and</p> <p>7 says, I want to talk about this. I don't want to</p> <p>8 put anything in writing; correct? I don't want to</p> <p>9 put more in writing.</p> <p>10 There's some background information --</p> <p>11 A. Yeah. That's what he wrote, yes.</p> <p>12 MR. GOODMAN: This will be Exhibit 8,</p> <p>13 which is 1275 through 1289.</p> <p>14 (Witte Exhibit 8, summary Bates-</p> <p>15 stamped Wayfair 1275 to 1289, marked for</p> <p>16 identification.)</p> <p>17 BY MR. GOODMAN:</p> <p>18 Q. Are you familiar with this document?</p> <p>19 A. I helped -- I was one of the contributors,</p> <p>20 yes.</p> <p>21 Q. And when was the document written?</p> <p>22 A. I'd have to, like, find out the exact date</p> <p>23 of when it started and when it came to a conclusion,</p> <p>24 but it was sent in finality of pulling it together.</p> <p>25 I want to say on the 19th for Stark. The day it was</p> <p style="text-align: right;">Page 131</p>	<p>1 I believe this was just a summary of all</p> <p>2 the interactions Kory and I had with Emily.</p> <p>3 Q. And who asked you to put this together?</p> <p>4 A. I'm pretty sure Kory and I did this on our</p> <p>5 own.</p> <p>6 Q. Okay.</p> <p>7 MS. KAPPELMAN: Bob, while you're</p> <p>8 sorting through, I know you've noticed Kory</p> <p>9 McKnight's deposition for 2:00, and he's going to</p> <p>10 try to join the link. Is it fair to say that you</p> <p>11 won't be done with this deposition in 20 minutes and</p> <p>12 ready to start Kory?</p> <p>13 MR. GOODMAN: I can't specifically</p> <p>14 estimate. I'm getting to the end of one set of</p> <p>15 questions I had, and the other questions may go</p> <p>16 quickly. It may not be right at 2:00. It will not</p> <p>17 be long after 2:00.</p> <p>18 MS. KAPPELMAN: Okay. At about ten of</p> <p>19 two, we'll tell Kory what the status is so he</p> <p>20 doesn't have to just sit.</p> <p>21 MR. GOODMAN: Yeah. If you just want</p> <p>22 to tell him 2:30 our time, that's fine. That way</p> <p>23 you can take a little break if you need it.</p> <p>24 MS. KAPPELMAN: Okay.</p> <p>25 Em, if you'll just write Kory about</p> <p style="text-align: right;">Page 133</p>

<p>1 2:30 our time.  2 Sorry, Bob. Go ahead.  3 BY MR. GOODMAN:  4 Q. Do you remember inviting Emily for a  5 one-on-one meeting in June 2019?  6 A. Do I have remember having a one-on-one with  7 Emily in June 2018?  8 Q. Right.  9 A. I'm not sure I remember specifically that,  10 but Emily and I had a weekly one-on-one, so I'm sure  11 we had one.  12 Q. Has anybody who worked with Mr. McKnight at  13 Walmart come to work at Wayfair since Mr. McKnight  14 started?  15 A. There are two employees that did work at  16 Walmart. One is Mike Thayer. The second is Eric  17 Moulds, but Eric Moulds was actually hired by a  18 gentleman named Sean Lane directly.  19 Q. And who was the first one? Mike who?  20 A. Mike Thayer, T-H-A-Y-E-R.  21 Q. Do you know when they were hired,  22 approximately?  23 A. Mike would have been late September or  24 early October of 2019, I think.  25 Q. Okay. And Mr. Moulds?</p> <p style="text-align: right;">Page 134</p>	<p>1 the question.  2 Go ahead.  3 A. Yes.  4 Q. And is Mr. Moulds -- is it M-O-L-D-S?  5 A. Yes.  6 M-O-U-L-D-S. Sorry.  7 Q. Is he still working under Mr. Lane?  8 A. As of right now, no. He actually reports  9 to me, as of very recently. Like, as of two days  10 ago.  11 Q. Has he reported to Mr. McKnight?  12 A. No, he has not.  13 Q. Is Mr. Lane in the IE organization?  14 A. Yes, he is.  15 Q. Why didn't Mr. Moulds get hired to work  16 under Mr. McKnight?  17 A. Because -- why didn't he? It was the --  18 Q. Right. Why didn't he?  19 A. Because it was Sean Lane -- it was his  20 hire. It was his employee to do work for Sean, not  21 for Kory.  22 Q. Okay.  23 A. Just to be clear, I don't think Kory knew  24 that Eric Moulds was actually even being interviewed  25 at the company until he was on the interview panel.</p> <p style="text-align: right;">Page 136</p>
<p>1 A. Maybe around a similar time.  2 I can find the exact dates if you want it.  3 Lynn told me not to look things up.  4 Q. And if you recall, when did Mr. McKnight  5 start? Did you say in April?  6 A. No. July 20th.  7 Q. July 20th, okay.  8 A. July 29th I think is when Kory started.  9 Q. These people -- and did Mr. Thayer take a  10 position under Mr. McKnight?  11 A. He did.  12 Q. Okay. What was the level?  13 A. L5.  14 Q. When Emily was terminated, how many  15 subordinates, direct subordinates, did Mr. McKnight  16 have?  17 MS. KAPPELMAN: Object to the form of  18 the question.  19 You can answer.  20 A. I want to say he had three, including  21 Emily.  22 Q. Okay. And then -- so he had two after her  23 termination. Then he had three again when  24 Mr. Thayer was hired?  25 MS. KAPPELMAN: Object to the form of</p> <p style="text-align: right;">Page 135</p>	<p>1 He wasn't referred or solicited. He applied through  2 a normal process.  3 Eric and Kory actually didn't work together  4 at Walmart. They knew each other from a company  5 called Symbotic Robotics a long time ago.  6 Q. Okay. Was there another -- so nobody else  7 from Walmart, besides Mr. Thayer, according to you,  8 has been hired by Wayfair to work with Mr. McKnight  9 at Walmart?  10 A. Who worked directly for Kory, no. That's  11 correct.  12 Q. Did you tell Mr. Shaffer or Ms. Smith that  13 you had solicited written statements about Emily?  14 MS. KAPPELMAN: Object to the form of  15 the question if you're done.  16 You can answer, Matt.  17 A. I believe, yes. It was part of the email,  18 so yes.  19 Q. You told them that statements that they  20 were looking at had been solicited?  21 MS. KAPPELMAN: Object to the form of  22 the question.  23 You can answer, Matt.  24 A. I think -- yes. You have the prior email,  25 but I think I said these are -- this is documented</p> <p style="text-align: right;">Page 137</p>

<p>1 feedback on Emily.</p> <p>2 Q. I'm going to need to take a break to get</p> <p>3 something to drink. Hold on a second. But I'm</p> <p>4 going to ask one more question before that.</p> <p>5 Do you remember a going away party for Greg</p> <p>6 Konicki?</p> <p>7 A. Yes.</p> <p>8 Q. Did you attend the party?</p> <p>9 A. I did.</p> <p>10 Q. Did an individual, during the -- during the</p> <p>11 party grab him and kiss him?</p> <p>12 A. Grab him and kiss him?</p> <p>13 Q. Yes.</p> <p>14 A. No. It was a joke. He didn't kiss him.</p> <p>15 Q. Did he pretend to kiss him?</p> <p>16 A. He leaned over to Greg.</p> <p>17 Q. Okay. Who was the other individual?</p> <p>18 A. Mark Schmitz.</p> <p>19 Q. Were there female employees in attendance</p> <p>20 at the retirement party?</p> <p>21 A. Yes.</p> <p>22 Q. And he mimicked kissing Mr. Konicki by his</p> <p>23 actions?</p> <p>24 A. Yes, he did.</p> <p>25 Q. And people laughed? I guess you laughed.</p> <p style="text-align: right;">Page 138</p>	<p>1 Q. Did you hear Mr. Konicki invite being</p> <p>2 wrestled and having this purported kiss given?</p> <p>3 A. Do I remember him inviting it? No. I</p> <p>4 think you have to ask Greg if he was offended by it.</p> <p>5 Q. Did Ms. Forsythe approach you in April of</p> <p>6 2019 about how she was being dealt with by</p> <p>7 Mr. McDole?</p> <p>8 MS. KAPPELMAN: Object to the form of</p> <p>9 the question.</p> <p>10 A. Ms. Forsythe approached me about McDole, or</p> <p>11 Mr. McDole approached me.</p> <p>12 Q. She recalls it as being April 18, 2019. Is</p> <p>13 that your recollection about the approximate time</p> <p>14 that she asked to help you address Mr. McDole's</p> <p>15 conduct toward her?</p> <p>16 A. I think that's approximate. I was on</p> <p>17 vacation, actually, that week, and I remember</p> <p>18 talking to Emily in the evening.</p> <p>19 Q. Did you call Mr. McDole that evening?</p> <p>20 A. Yes. I spoke to both of them that night.</p> <p>21 Q. When Emily called you for help, what did</p> <p>22 she ask specifically?</p> <p>23 A. I think it was the -- I think it was</p> <p>24 around, like, the similar documentations she had in</p> <p>25 her email. I'd have to read it to refresh myself.</p> <p style="text-align: right;">Page 140</p>
<p>1 You thought it was a joke?</p> <p>2 A. Yes. I think everyone laughed.</p> <p>3 Q. What was the -- was anything said before or</p> <p>4 after that to explain that it was a joke?</p> <p>5 A. Yeah. I mean, it was a joke. It was</p> <p>6 definitely a joke.</p> <p>7 I can't remember. It was over a year and a</p> <p>8 half ago, almost.</p> <p>9 Q. Did you think that was the -- that that was</p> <p>10 a wise thing to happen in front of female employees?</p> <p>11 MS. KAPPELMAN: Object to the form of</p> <p>12 the question.</p> <p>13 You can answer, Matt.</p> <p>14 A. In hindsight no, probably not.</p> <p>15 Q. And by now you mean because of the</p> <p>16 complaint of sexual harassment that Emily made,</p> <p>17 or --</p> <p>18 A. No. It's just looking back on that over</p> <p>19 time, that was that appropriate? Probably not.</p> <p>20 Q. I'll represent to you that the question was</p> <p>21 asked of Emily, "And what did Greg say? Did Greg</p> <p>22 say it was unwelcome?"</p> <p>23 And her answer was, "Yes."</p> <p>24 Is that your recollection?</p> <p>25 A. I was sitting five away from Greg.</p> <p style="text-align: right;">Page 139</p>	<p>1 But it was around, you know, kind of not listening</p> <p>2 to what she wanted to do.</p> <p>3 And then I think Mike's issue with her was</p> <p>4 around, like, perception of being bullied.</p> <p>5 Q. Okay. So he thought -- so are you</p> <p>6 suggesting that he thought he was being bullied?</p> <p>7 A. Yes. That's what I said. I think he even</p> <p>8 stated something where -- I'm not going to be</p> <p>9 bullied. I'll go to talent management, or something</p> <p>10 like that, if we can't work it out.</p> <p>11 Q. He was suggesting that he would complain</p> <p>12 about her to talent management about her bullying?</p> <p>13 A. Yes.</p> <p>14 Q. After you talked with McDole, did you tell</p> <p>15 Emily if she recalled that Mike was obsessed?</p> <p>16 A. Can you clarify?</p> <p>17 Q. She recalls that you told her you believe</p> <p>18 that Mike was obsessed.</p> <p>19 A. Are you saying obsessed?</p> <p>20 MS. KAPPELMAN: I think he's tying to</p> <p>21 say obsessed, O-B.</p> <p>22 A. Obsessed with Emily?</p> <p>23 Q. The recollection is that you were obsessed.</p> <p>24 Did you say that -- obsessed with Emily? Obsessed</p> <p>25 with the issues that she was raising? Did you say</p> <p style="text-align: right;">Page 141</p>

<p>1 that to Mr. -- to Emily?</p> <p>2 A. I said upset, U-P-S-E-T, just to make</p> <p>3 sure -- maybe I'm not talking clear.</p> <p>4 Q. You admit that you said to her he was</p> <p>5 upset. Are you denying saying that he was obsessed?</p> <p>6 MS. KAPPELMAN: So just to be clear,</p> <p>7 he's saying you admit U-P-S-E-T. Are you denying</p> <p>8 that you told her that McDole was O-B-S-E-S-E-D</p> <p>9 with her?</p> <p>10 THE WITNESS: Okay. So thank you.</p> <p>11 A. I think I said upset. I don't remember</p> <p>12 saying obsessed.</p> <p>13 Q. She recalls you saying to her -- and I'll</p> <p>14 ask you the same question. Did you say that Mike is</p> <p>15 mentally unstable after you talked with her about</p> <p>16 your call with him?</p> <p>17 A. I don't remember exactly what we would have</p> <p>18 said. I think it would have been -- Mike could work</p> <p>19 27 hours straight in a day. He would do things like</p> <p>20 that that some of us would find odd. So there were</p> <p>21 times where you'd wonder if -- yeah. I don't know</p> <p>22 how --</p> <p>23 Q. So that would be a kind of -- working</p> <p>24 yourself to death was something that you think of as</p> <p>25 mentally unstable?</p> <p style="text-align: right;">Page 142</p>	<p>1 thought about -- whether she thought he had that</p> <p>2 diagnosis?</p> <p>3 A. I vaguely remember that.</p> <p>4 And I think if I was asking that, it would</p> <p>5 have been in a supportive-type manner to make sure</p> <p>6 that we weren't overwhelming Mike, because he did do</p> <p>7 multiple tours of duty.</p> <p>8 That's not to -- I just want to make sure</p> <p>9 that's not coming out as, like, discrimination</p> <p>10 against Mike. It's a handicap, like anything</p> <p>11 else -- a person dealing with a speech impediment,</p> <p>12 that we make sure that we get verbal communications</p> <p>13 from before we present. It would be similar with</p> <p>14 Mike, making sure we're not putting him into undue</p> <p>15 situations.</p> <p>16 MR. GOODMAN: Object to</p> <p>17 responsiveness.</p> <p>18 BY MR. GOODMAN:</p> <p>19 Q. So you recall asking Emily whether she</p> <p>20 thought he had some serious psychiatric problem?</p> <p>21 MS. KAPPELMAN: Object to the form of</p> <p>22 the question. That's not what he said.</p> <p>23 You can answer again, Matt.</p> <p>24 A. I remember asking Emily if we -- it wasn't</p> <p>25 like, do you think that? It was more of an opinion.</p> <p style="text-align: right;">Page 144</p>
<p>1 MS. KAPPELMAN: Object to the form of</p> <p>2 the question.</p> <p>3 Matt, listen closely to the question.</p> <p>4 Go ahead and answer.</p> <p>5 BY MR. GOODMAN:</p> <p>6 Q. You can answer.</p> <p>7 A. Do I think it's mentally unstable to -- not</p> <p>8 that it's mentally unstable. I think it's odd.</p> <p>9 And what I thought about with Mike, he was</p> <p>10 a prior Marine, a recon Marine, so he was used to</p> <p>11 working 30, 40 hours straight in his prior life and</p> <p>12 prior role, which I later determined at the company.</p> <p>13 But, you know, initially starting -- someone working</p> <p>14 from 7:00 a.m. until, you know, noon the next day</p> <p>15 straight was odd.</p> <p>16 Q. Okay. Did you say to Emily, when you spoke</p> <p>17 to her about your conversation with Mike, that Mike</p> <p>18 was mentally unstable or words to that effect?</p> <p>19 A. I don't remember. I could have said that,</p> <p>20 but I don't remember. I didn't document that</p> <p>21 conversation.</p> <p>22 Q. She also recalls that you asked Emily if</p> <p>23 she thought that McDole had PTSD or something else</p> <p>24 mentally wrong with him.</p> <p>25 Did you ask her a question, what she</p> <p style="text-align: right;">Page 143</p>	<p>1 Do you think there might have been some PTSD or</p> <p>2 something like that from his time overseas?</p> <p>3 Q. And you only said that to Emily after you</p> <p>4 had that call with Mr. McDole. You had not said</p> <p>5 anything like that to her previously; correct?</p> <p>6 A. No.</p> <p>7 Q. You mean you had not said anything like</p> <p>8 that to her previously; correct?</p> <p>9 A. Not that I recall.</p> <p>10 Q. And on the call with Emily, you told Emily</p> <p>11 that you had told Mike that she would be taking over</p> <p>12 certain of his projects. Do you recall that?</p> <p>13 A. I think so. Because I believe at the time</p> <p>14 Mike was moving to the operations function.</p> <p>15 Q. So you -- do I gather you told Emily</p> <p>16 correctly that you were taking back his projects,</p> <p>17 which were within IE, and you're explaining that --</p> <p>18 you recall doing so in anticipation of his moving to</p> <p>19 the operations function; correct?</p> <p>20 A. Yes. Mike was taking a role to be a senior</p> <p>21 manager at a site -- it was the Lathrop, California</p> <p>22 building -- to actually work and run operations, not</p> <p>23 in a support group that I was managing that actually</p> <p>24 built the infrastructure and processes. So Mike was</p> <p>25 taking a move to a new scope of work.</p> <p style="text-align: right;">Page 145</p>

<p>1 Q. But you took projects away from him to keep 2 within IE; correct?</p> <p>3 A. Sure. They existed in my function. They 4 didn't exist in general operations.</p> <p>5 Q. Okay. Why did you take -- why did you take 6 the projects away from him and tell Emily -- why did 7 you take those projects away from him, and why did 8 you tell Emily that you had done so?</p> <p>9 A. Why did I take them away? I took them away 10 because he was going to the operations function. 11 Operations' job is to manage employees to 12 move parcels. The industrial engineering team's 13 function is to build physical infrastructure in a 14 building.</p> <p>15 His new role didn't take it -- it was like 16 saying a teacher left second grade to go teach third 17 grade, and you took away her second-grade duties and 18 gave it to a new teacher.</p> <p>19 Q. Did you bring up concerns about the mental 20 stability, psychiatric condition of Mr. McDole to 21 HR?</p> <p>22 A. Not that I recall.</p> <p>23 Q. Why not?</p> <p>24 A. Because the conversations would go in 25 circles. I'd have a good conversation with Mike.</p> <p style="text-align: right;">Page 146</p>	<p>1 MS. KAPPELMAN: Objection to the form.</p> <p>2 BY MR. GOODMAN:</p> <p>3 Q. Right?</p> <p>4 MS. KAPPELMAN: Objection to the form.</p> <p>5 He said he asked if she thought he had PTSD.</p> <p>6 MR. GOODMAN: Well, PTSD is a 7 psychological problem, Lynn.</p> <p>8 MS. KAPPELMAN: You say it is.</p> <p>9 Let's say what he said. I don't want 10 you mischaracterizing his testimony. It's 11 posttraumatic stress disorder from being in the 12 Marines. That's what he said he thought Mike might 13 have, but he didn't know.</p> <p>14 BY MR. GOODMAN:</p> <p>15 Q. And if you thought that, why didn't you 16 raise the issue with HR?</p> <p>17 A. I had never seen any behaviors from Mike 18 that warranted that.</p> <p>19 Q. But you had been told about behaviors from 20 Emily that warranted that, didn't you? That's 21 why --</p> <p>22 MS. KAPPELMAN: Object to the form.</p> <p>23 You can answer.</p> <p>24 A. I did not hear hostile behaviors from Mike. 25 I did not hear anything that was alarming or</p> <p style="text-align: right;">Page 148</p>
<p>1 And then Emily would love Mike and she'd say he's 2 great, everything's great. And then it wouldn't.</p> <p>3 And it really only got escalated in the 4 April time frame from Emily around any issues with 5 Mike.</p> <p>6 Q. Well, if you had concerns about 7 Mr. McDole's psychological stability in what you 8 characterize as a benevolent and protective manner, 9 wanting to avoid discrimination against him as a 10 psychiatrically disabled individual, why didn't you 11 bring it to the attention of HR?</p> <p>12 MS. KAPPELMAN: You're putting words 13 in his mouth. He has not said he had concerns about 14 him psychologically. And I'm going to object to 15 that, and I'm going to ask him to answer again, very 16 clearly.</p> <p>17 BY MR. GOODMAN:</p> <p>18 Q. You can answer.</p> <p>19 A. So what you're asking me is did I have 20 concerns over Mike and his mental well-being to be 21 an employee at Wayfair and to safely do so --</p> <p>22 Q. No, I'm not. I'll reask the question.</p> <p>23 A. Thank you.</p> <p>24 Q. You've already indicated that you asked 25 Emily if she thought he had a psychological problem.</p> <p style="text-align: right;">Page 147</p>	<p>1 threatening.</p> <p>2 As I told you before, Mike had some quirks 3 about him. Mike liked to work 27-hour days that no 4 one else did, and wondered if there was just -- part 5 of his brain was still wired of how he operated from 6 his prior employer, which was the Marine Corps.</p> <p>7 Q. The conversation with Emily in the middle 8 of April was not just about quirks or working long 9 days, was it?</p> <p>10 MS. KAPPELMAN: Object to the form.</p> <p>11 A. Sir, I don't remember the entirety of the 12 conversation. It was -- I was on vacation. It was 13 in the evening.</p> <p>14 Q. So by the time you got back to work, had 15 you forgotten about the concerns that you and Emily 16 expressed about his psychological condition?</p> <p>17 MS. KAPPELMAN: Object to the form; 18 mischaracterizes his statement.</p> <p>19 You can answer, Matt.</p> <p>20 A. I did take action. I spoke to his new 21 supervisor. And at the time, we determined that 22 Emily and Mike just weren't a good fit to work 23 together, but we didn't think there was anything 24 around hostility or issues. Mike had feedback from 25 other stakeholders.</p> <p style="text-align: right;">Page 149</p>

<p>1 Q. Mr. Bugarin -- was Mr. Bugarin his 2 supervisor? B-U-G-A-R-I-N?</p> <p>3 A. B-U-G-A-R-I-N.</p> <p>4 Q. So you're saying that you talked to 5 Mr. Bugarin about Mr. McDole, and he was going to 6 come under the supervision of Mr. Bugarin and no 7 longer be under your -- no longer be in your 8 organization; is that correct?</p> <p>9 A. That is correct.</p> <p>10 Q. Did you bring up with Mr. Bugarin the issue 11 of his psychological well-being?</p> <p>12 MS. KAPPELMAN: I'm going to warn you 13 right now, Bob, that I think you're going to the 14 area of defamation for Mr. McDole. And I'm going to 15 give you a fair warning that if it keeps up and you 16 keep mischaracterizing Mr. Witte's comments to 17 suggest that there's a psychological problem with 18 Mr. McDole, we will go to the judge for 19 clarification, and we will seek sanctions. So feel 20 free to keep it up, but I think you're moving into 21 the area of defamation of a nonparty witness.</p> <p>22 Go ahead, Matt. You can answer.</p> <p>23 A. Can you repeat the question, Bob?</p> <p>24 Q. Did you report your conversation with Emily 25 and your conversation with McDole in mid-April to</p> <p style="text-align: right;">Page 150</p>	<p>1 A. I may have said that. I think I did say 2 that.</p> <p>3 Q. What did you mean?</p> <p>4 A. I think we were all under a lot of work and 5 a lot of stress at the time, and I think I made that 6 statement. But then I immediately maintained 7 everything I was supposed to do as a manager.</p> <p>8 Q. Did you observe behaviors from him during 9 your meeting with him alone that had anything to do 10 with your comment about not having time to deal with 11 this shit?</p> <p>12 A. With Mike?</p> <p>13 Q. Yes.</p> <p>14 A. I'm sorry. Can you --</p> <p>15 Q. Did you observe -- in your separate meeting 16 with him, did you observe behaviors which had 17 something to do with your saying you don't have time 18 to deal with this shit to Emily?</p> <p>19 A. No. I think at the time -- I want to say 20 the purpose of that meeting -- and we all flew out 21 to California -- was to talk about transition plan 22 and who would be assigned as, like, project owners. 23 We actually filled out a RACI chart, if you're 24 familiar with this, of, like, who's actually in 25 charge of project tasks.</p> <p style="text-align: right;">Page 152</p>
<p>1 anybody else?</p> <p>2 A. I reported it to Genaro because they 3 were -- I think at that point in time Mike was 4 already moving to operations because Mike wanted to 5 get into operations. Mike didn't move into 6 operations because he was ineffective in his role or 7 anything like that. He wanted to get into 8 operations. He wanted to have a chance to be 9 promoted to a site director and run a building.</p> <p>10 Q. So is Mr. Bugarin the only one you spoke to 11 about those conversations with Emily and Mr. McDole?</p> <p>12 A. I can't remember at this point in time.</p> <p>13 Q. In May 2019, did you have a -- did 14 Mr. McDole ask for a meeting with you and Emily?</p> <p>15 A. Yes.</p> <p>16 Q. Did you ask Emily to leave the meeting?</p> <p>17 A. I did.</p> <p>18 Q. Why did you ask Emily to leave the meeting 19 and continue without her?</p> <p>20 A. Mike was upset in that meeting. I wanted 21 to make sure I understood Mike's forum without 22 having both of them in the room directly with each 23 other.</p> <p>24 Q. Did you tell Emily you didn't have time to 25 deal with this shit?</p> <p style="text-align: right;">Page 151</p>	<p>1 For the entire meeting, I thought we were 2 at a decent place. Mike was then further upset, so 3 I did ask Emily to leave the room so I could talk to 4 Mike.</p> <p>5 Q. Did he continue to express upset or anger 6 after Emily left the room?</p> <p>7 A. I can't remember. I think he was 8 initially, and then he calmed down and we had a 9 logical discussion.</p> <p>10 Q. Did you report his behavior in that 11 separate meeting with you to HR?</p> <p>12 A. I reported it to his direct boss at the 13 time, Genaro Bugarin.</p> <p>14 Q. And do you know if Mr. Bugarin did anything 15 about it?</p> <p>16 A. I think Mr. Bugarin left the organization 17 very briefly after that.</p> <p>18 Q. And you're not aware of him doing anything 19 with the information between the time you told him 20 and the time he left the organization; right?</p> <p>21 A. Not that I'm aware of, no.</p> <p>22 Q. You told Emily, after this conversation -- 23 the conversations in May, to stay away from McDole, 24 didn't you?</p> <p>25 A. I may have. I have a pretty sharp memory.</p> <p style="text-align: right;">Page 153</p>

<p>1 I don't remember everything from April of last year 2 if I didn't document it, write it down. 3 Q. You had Mr. McDole succeed -- do I 4 understand correctly that Mr. McDole succeeded 5 Mr. Bugarin as head of the site? 6 A. No. That's incorrect. 7 Q. Okay. 8 A. Just to be clear, Mr. Bugarin ran the West 9 Coast of a region of multiple buildings. It's like 10 the general manager of the West Coast operations. 11 Mike McDole has been serving as interim 12 site leader for that site, but he has not officially 13 been promoted to a Level 5 employee. I think the 14 organization is still interviewing. So Mike has not 15 officially taken Genaro's job. That's a level 16 higher than -- it's actually two levels higher than 17 he's currently employed at. 18 Q. When was he made acting site leader? 19 A. I want to say it would have been like 20 October or November. I can't remember. I can find 21 out exactly. It would take some time to search. 22 Q. Is it acceptable for a man to run his hands 23 down a female coworker's blouse between her breasts 24 without consent of the female employee? 25 MS. KAPPELMAN: Object to the form of</p> <p style="text-align: right;">Page 154</p>	<p>1 MS. KAPPELMAN: If you know. 2 BY MR. GOODMAN: 3 Q. -- after that complaint? 4 MS. KAPPELMAN: If you know. 5 A. Not that I'm aware of. 6 Q. As we sit here today, are you troubled by 7 the fact that three separate instances of 8 unconsented touching occurred without any counsel or 9 discipline of Mr. McDole? 10 MS. KAPPELMAN: Object to the form of 11 the question; assumes facts that aren't in 12 evidence -- many facts that aren't in evidence. 13 You can answer, Mr. Witte. 14 A. If it were true, of course anybody would be 15 upset by it. But that was the purpose of the 16 investigation. 17 I also have to say that, you know, 18 Emily's -- Mike's first week of work they both went 19 hiking together in the woods in California on their 20 own, which I thought was odd. But, like, I thought 21 they had a good relationship. 22 Q. The first week of what, you said? 23 A. I think Mike's first or second week of work 24 out in California, the two of them went hiking in 25 the woods together.</p> <p style="text-align: right;">Page 156</p>
<p>1 the question. 2 You can answer as if this was a 3 hypothetical. Answer. It's a hypothetical. 4 A. No, not acceptable. 5 Q. After you were made aware of Mr. McDole 6 doing that and being involved in several other 7 instances of touching Emily without her consent, did 8 you take any action to counsel or discipline 9 Mr. McDole about unconsented touching? 10 MS. KAPPELMAN: Object to the form of 11 the question; mischaracterizes everything that's 12 come before, including the August 14th complaint. 13 But feel free to answer with respect 14 to what you learned in the August 14th complaint and 15 what you did with that information. 16 A. So per the August 14th complaint, when I 17 was notified of all of those issues per Emily, I 18 turned it over to talent management to launch an 19 internal investigation. 20 Q. But did you ever counsel or discipline 21 Mr. McDole about unconsented touching of a female 22 employee after you got that complaint? 23 A. No. He was not my employee. 24 Q. Did anybody at Wayfair counsel or 25 discipline him in that regard --</p> <p style="text-align: right;">Page 155</p>	<p>1 Q. What month was that? 2 A. I want to say it would have been October of 3 2017 or November. 4 Q. Which was about a year and a half before 5 any of the alleged unconsented touching began to 6 occur; correct? 7 MS. KAPPELMAN: No. It's the first 8 week of work in California. 9 THE WITNESS: Yeah. 10 MR. GOODMAN: October of 2017? 11 MS. KAPPELMAN: No. 12 MR. GOODMAN: Counsel, you know, 13 you're not allowed to answer -- 14 MS. KAPPELMAN: Well, you're 15 mischaracterizing his testimony, Bob. I'm not going 16 to let the record reflect you mischaracterizing his 17 testimony. That, I won't do. 18 MR. GOODMAN: He said October 2017. 19 BY MR. GOODMAN: 20 Q. When was it, Mr. Witte? 21 A. October 2018. I apologize. 22 Q. So that was about six months before the 23 first alleged unconsented touching; correct? 24 A. Yes. 25 Q. Was there any delay between your getting</p> <p style="text-align: right;">Page 157</p>

<p>1 the chronology of events from Emily and alerting HR 2 to it?</p> <p>3 A. I believe there was a four- to five-day 4 delay from when she sent me the email until I 5 actually got a chance to read the entire document.</p> <p>6 Q. And why was -- why did such a delay occur 7 concerning such a serious complaint?</p> <p>8 A. I think the way that Emily shared the email 9 with me was, FYI, here's an internal file on Mike 10 McDole. The first five or six pages -- I was 11 traveling a ton. I think I was traveling back from 12 California when I received the email, and then I had 13 a flight to Europe on Sunday. I don't think I did 14 my work over the weekend. And then I read it when I 15 got to Europe in the full context, and that's when I 16 notified talent management.</p> <p>17 Q. Did anybody ever ask you why you delayed in 18 getting it to HR?</p> <p>19 A. No, no one's ever asked me that.</p> <p>20 Q. Well, I just asked.</p> <p>21 A. Sure.</p> <p>22 Oh, are you asking me why I delayed?</p> <p>23 The first five pages of it were --</p> <p>24 Q. No. But I'm the first person who's ever 25 said why did you -- for heaven's sake, why did you</p> <p style="text-align: right;">Page 158</p>	<p>1 tech company like Google.</p> <p>2 Q. You're not disputing that -- that statement 3 to her; correct?</p> <p>4 A. Am I disputing I said Wayfair eats people 5 up? No.</p> <p>6 There was also a time in the summer when I 7 knew Emily needed a break, and I told her that she 8 needed to take a week off and reset. It's important 9 to do those things.</p> <p>10 Q. But in this particular case, it was after 11 she told you she was stressed out about dealing with 12 the McDole situation; correct?</p> <p>13 A. I don't remember, sir.</p> <p>14 Q. Did you have work-related stress that may 15 have caused an eye injury that you discussed with 16 Emily?</p> <p>17 A. It could have been work-related stress, or 18 it could have been lifting related. It's called 19 central serous retinopathy. It's common for Type 20 A -- this is my doctor's quote, not mine. This is 21 going to sound weird. He said the common person 22 that gets it is a white male between the ages of 30 23 to 35 -- 30 to 50 with a Type A personality.</p> <p>24 Q. And what are the symptoms? Because I --</p> <p>25 MS. KAPPELMAN: I'm going to direct</p> <p style="text-align: right;">Page 160</p>
<p>1 delay this?</p> <p>2 A. Yeah. Because I told everyone I got the 3 email, read the first few pages of it. When I read 4 the full thing is when I notified internal talent 5 partners.</p> <p>6 Q. In early September, Emily told you that she 7 was stressed out about the situation with Mr. McDole 8 and her complaint against him, didn't she?</p> <p>9 MS. KAPPELMAN: Object to the form of 10 the question.</p> <p>11 You can answer.</p> <p>12 A. She may have. I can't remember.</p> <p>13 She actually told me at one point in time 14 she was relieved, so it was both.</p> <p>15 Q. But that was after you passed along her 16 complaint earlier; correct?</p> <p>17 A. Yes.</p> <p>18 Q. In the beginning of September when she 19 talked to you about this, you told her that Wayfair 20 eats people up.</p> <p>21 MS. KAPPELMAN: Object to the form of 22 the question.</p> <p>23 You can answer, Matt.</p> <p>24 A. It's a tough work environment. It's 25 challenging. It's similar to Amazon or any other</p> <p style="text-align: right;">Page 159</p>	<p>1 you not to answer. I'm going to direct you not to 2 answer, Matt.</p> <p>3 This is not relevant to anything that 4 has to do with this lawsuit about sexual harassment. 5 So if you want to go to a judge about asking 6 Mr. Witte about his medical condition, I'm so happy 7 to do that.</p> <p>8 Can you try to stay on topic?</p> <p>9 MR. GOODMAN: He shared it with 10 Ms. Forsythe, for heaven's sake.</p> <p>11 MS. KAPPELMAN: I don't care whether 12 he shared it with -- it doesn't mean it's relevant 13 to her claims of sexual harassment.</p> <p>14 BY MR. GOODMAN:</p> <p>15 Q. What is so stressful about working at 16 Wayfair?</p> <p>17 A. What is so stressful?</p> <p>18 Q. Yeah.</p> <p>19 A. It's a fast, dynamic work environment.</p> <p>20 Q. Did you tell --</p> <p>21 A. It's growing at greater than 50 percent the 22 entire time I've been here.</p> <p>23 Q. Did you tell Ms. Forsythe in September 2019 24 that you didn't think you could last much longer?</p> <p>25 A. I think I told her that in the current</p> <p style="text-align: right;">Page 161</p>



<p>1 region and role that I have it was going to be 2 difficult.</p> <p>3 But that wasn't because of Wayfair, 4 necessarily. That was a family condition as well. 5 You have to understand. I have three small kids, 6 and I was on the road 60 to 70 percent of the time 7 and not seeing them grow up. It wasn't just I 8 couldn't handle the job. It was a broader family 9 situation of this what I want to do for the rest of 10 my life, not see my kids grow up?</p> <p>11 Q. Did you consider -- in September 2010, did 12 you consider yourself -- well, in August and 13 September 2010 -- 2019, excuse me -- did you 14 consider yourself too overwhelmed to protect Emily 15 from future sexual harassment by McDole?</p> <p>16 MS. KAPPELMAN: Object to the form of 17 the question. That's a crazy question.</p> <p>18 If you even understand it, Matt, you 19 can answer. But it's an outlandish question. 20 Argumentative and outlandish.</p> <p>21 BY MR. GOODMAN:</p> <p>22 Q. You can answer.</p> <p>23 A. No, I did not consider I would have been at 24 that point in time. There are always priorities at 25 work. You always take care of your people and make</p> <p style="text-align: right;">Page 162</p>	<p>1 MS. KAPPELMAN: Okay. Go ahead.</p> <p>2 THE VIDEOGRAPHER: The time is now 3 2:11, and we're going off the record.</p> <p>4 MR. GOODMAN: No, we're not going off 5 the record.</p> <p>6 MS. KAPPELMAN: We're staying on the 7 record, Chris.</p> <p>8 THE VIDEOGRAPHER: I'm sorry.</p> <p>9 BY MR. GOODMAN:</p> <p>10 Q. On the September 10, 2019, call, the issue 11 of Mr. McDole's mental stability again was discussed 12 between you and Emily; correct?</p> <p>13 MS. KAPPELMAN: Object to the form of 14 the question.</p> <p>15 You can answer again.</p> <p>16 A. From what I remember, perhaps. I don't 17 remember the conversation.</p> <p>18 Q. Did you say to her, as she recalls, that 19 you thought McDole had PTSD and that that may be the 20 reason he was crazy and unpredictable?</p> <p>21 A. I don't recall saying that.</p> <p>22 Q. You didn't bring up any concern about his 23 psychiatric condition to HR after September 10th 24 either, did you?</p> <p>25 MS. KAPPELMAN: Asked and answered.</p> <p style="text-align: right;">Page 164</p>
<p>1 sure they're safe at work, you're doing the right 2 thing. That always comes to the top.</p> <p>3 The next one -- and it's just a rank 4 prioritization. There's always things at this 5 company I'm not going to get to, but taking care of 6 someone's well-being and making sure they're being 7 effective with their role is the number one as a 8 manager. I do not think at any point in time I was 9 incapacitated for that.</p> <p>10 MS. KAPPELMAN: It's 2:15, Bob, so -- 11 we're going to take a 15-minute break between 12 depositions. If you still have to ask questions of 13 this witness, we're going to tell Kory McKnight not 14 to log in until later. So what's the story?</p> <p>15 MR. GOODMAN: Well, I told you I 16 thought I'd be done by 2:30, and I still think 17 that's true, but you're cutting it off.</p> <p>18 MS. KAPPELMAN: No, I'm not cutting it 19 off. I'm telling you we're going to take a break in 20 between the two depositions, and I don't want 21 Mr. McCormick to just sit around waiting for you.</p> <p>22 So if you think you'll be done by 23 2:30, I'll tell him to log in at 2:45.</p> <p>24 MR. GOODMAN: I would tell him to log 25 in at 2:45.</p> <p style="text-align: right;">Page 163</p>	<p>1 You can answer yet again, Matt.</p> <p>2 BY MR. GOODMAN:</p> <p>3 Q. My earlier question was about March. So 4 I'm asking again, as of September 10th you didn't 5 raise an issue at that time, did you?</p> <p>6 A. No. But -- no, I did not. He was not my 7 employee.</p> <p>8 And also, he didn't have any feedback from 9 anyone else on his sites that was negative, short of 10 from Emily.</p> <p>11 MR. GOODMAN: Object to 12 responsiveness.</p> <p>13 BY MR. GOODMAN:</p> <p>14 Q. Why did you tell Emily -- ever tell Emily 15 to stay away from Mr. McDole?</p> <p>16 A. I don't remember that. I could have said 17 that. I don't remember if I did say that, or if I 18 didn't say that.</p> <p>19 Q. Did you ever tell HR that -- anybody at HR 20 that Mr. McDole should not be alone with Emily?</p> <p>21 A. Not that I remember.</p> <p>22 Q. Did you tell Ms. Forsythe, as she recalls, 23 on September 10, 2019, that you were, so to speak, 24 pissed with him taking some of your team members?</p> <p>25 A. Attempting to take them, yes, I did.</p> <p style="text-align: right;">Page 165</p>


<p>1 Q. Did you tell him that -- did you tell Emily 2 that you were concerned -- that you believed he had 3 lied about transferring people? 4 A. I don't think he lied because I questioned 5 him after I talked to Emily. But he definitely did 6 it. He wanted to build a really good team, and I 7 had a smart group of people that worked on the site 8 at the time when the company was going through a 9 broader reorganization where we built a continuous 10 improvement team, many of which -- of my initial 11 industrial engineering team got recruited into those 12 roles. I was upset that he tried to do it without 13 contacting me directly, yes. 14 Q. So you may have told Emily that he lied, 15 but then you corrected that impression when you 16 talked to McDole himself? 17 MS. KAPPELMAN: Object to the form of 18 the question. That's not what he testified. You're 19 mischaracterizing. 20 BY MR. GOODMAN: 21 Q. I'm asking a separate question. 22 Did you -- is it possible that you told 23 Emily that he lied about transferring people but 24 then had a less harsh view of that after you spoke 25 with him?</p> <p style="text-align: right;">Page 166</p>	<p>1 Q. Without his consent, right. 2 A. I have not heard that complaint. 3 Q. But nevertheless, you believe that he, as a 4 male employee, treated Ms. Forsythe, as a female 5 employee, as you would -- as you think was 6 appropriate? 7 A. From my direct interactions, I didn't have 8 anything that was inappropriate from a male versus 9 female. They had work behaviors around attitudes 10 toward each other in collaboration that were both 11 nonprofessional, but nothing around, like, sexual 12 bias towards either party. 13 Q. Well, once you got -- once you got the 14 complaint in August, you had a basis for changing 15 your opinion that the way he treated her was 16 appropriate, didn't you? 17 MS. KAPPELMAN: Object to the form of 18 the question. 19 You can answer, Matt. 20 A. I read the email in August. Emily worked 21 for me at the time. I wanted to make sure that she 22 had a thorough investigation against her, you know, 23 wishes, and I turned it over to talent management. 24 I wanted to make sure, if there was an issue, that 25 someone investigated thoroughly and they came back</p> <p style="text-align: right;">Page 168</p>
<p>1 A. That is correct. 2 Q. Did Mr. McDole, during the time he and 3 Emily were both employed by Wayfair, treat Emily, 4 independent of her sex and his sex, professionally? 5 A. I believe so, yes. 6 Q. Did he treat her in a way that you would 7 want a male employee to treat a female employee, 8 whether they were subordinate and superior or peers? 9 A. Are you talking from my observations? 10 Like, my direct interactions? Or are you talking 11 about -- 12 Q. No. Based on your direct observations and 13 all the information you had from either one of them 14 or talking to -- talking to both of them that -- 15 that evening in April. 16 A. So I think the early days we were totally 17 fine. It was a good working relationship. Both of 18 them -- not just Mike. Both of them interacted with 19 each other from April, May, and June was 20 unprofessional, and I didn't like it. 21 Q. Did you ever -- well, did you ever hear 22 Mr. McDole complain of unconsented touching of him 23 by Ms. Forsythe? 24 A. Did I ever hear Mike complained that 25 Ms. Forsythe touched Mike?</p> <p style="text-align: right;">Page 167</p>	<p>1 with, you know, a course of action. 2 Q. And if you told Emily that you thought 3 Mr. McDole may be lying about transferring people, 4 did you report your concern about him lying to HR? 5 MS. KAPPELMAN: Object to the form of 6 the question. 7 You can answer, Matt. 8 A. I called Mr. McDole directly. 9 Q. Okay. But you didn't report it to HR; 10 correct? 11 A. No. There was -- I -- if every manager 12 ever reported to HR every employee issue, there's 13 not a point of a manager. You pick up the phone and 14 you call and say, hey, what happened here? This 15 doesn't make sense. 16 On that one specifically, I said, "Mike, 17 these people work on my team. They're part of my 18 team. If you want them for your site, that's fine. 19 They can apply for a role. But we can't just 20 transfer an organization." 21 He said, "I'm sorry. I understand." 22 Q. So when you thought he lied, you called him 23 directly. That's what you're saying; right? 24 A. Yes. 25 Q. But when you were informed that he had</p> <p style="text-align: right;">Page 169</p>

<p>1 sexually harassed Emily, you didn't talk to him 2 directly; correct? 3 MS. KAPPELMAN: Object to the form of 4 the question. He got a complaint, and he turned it 5 over. Please don't mischaracterize his testimony. 6 Matt, you can tell him again what you 7 did when you received the August 14th -- 8 MR. GOODMAN: No. That's not my 9 question. 10 MS. KAPPELMAN: For the fifth or sixth 11 time. 12 BY MR. GOODMAN: 13 Q. You did not call Mr. McDole directly when 14 you got the complaint about sexual harassment; 15 right? 16 A. No. Nor would I. I would turn it over to 17 the internal talent organization. Because if he had 18 said, I didn't do that, and then I ended there, that 19 would have been the full investigation that our 20 company then took. 21 Q. Did you express to Emily that you thought 22 Mr. McDole had violent tendencies? 23 A. I don't remember violent tendencies. I've 24 never seen a violent tendency out of Mike. I saw 25 him raise his voice in a room one time.</p> <p style="text-align: right;">Page 170</p>	<p>1 A. Yes. 2 Q. Did he get so drunk on one occasion that he 3 chased Chris Bell trying to kiss him? 4 A. He was chasing him, not trying to kiss him. 5 I don't remember that. That was -- I think 6 he chased him around the room in New Jersey. I was 7 there. 8 Q. Okay. And you just don't remember the part 9 about trying to kiss him or pretend to kiss him? 10 A. It was -- I don't think he would have 11 actually kissed him. I'm not -- I don't remember. 12 Q. Just, like, for the same reason Mr. Schmitz 13 only pretended to kiss Mr. Konicki? 14 A. So Chris is German. There's different 15 cultural things with German people. The first time 16 I met Chris, he gave me a big hug and a kiss on the 17 cheek, and I thought it was odd. But that was a 18 cultural thing that I later understood. So I don't 19 take doing that as offensive after I got to know 20 him. 21 Q. Were there any instances, other than the 22 two we identified, where one male pretended to show 23 aggression towards another male that you can recall 24 having occurred during Emily's employment by 25 Wayfair?</p> <p style="text-align: right;">Page 172</p>
<p>1 Q. Were there team dinners that occurred 2 during Emily's employment? 3 A. Sure. 4 Q. Was there always alcohol at the team 5 dinners? 6 A. I mean, there was typically alcohol at 7 Wayfair. Wayfair has kegs of beer in the break 8 rooms at the corporate office. 9 Q. Was there an instance in which Mr. Stark 10 got drunk? 11 MS. KAPPELMAN: Mr. Who? 12 MR. GOODMAN: Stark. 13 MS. KAPPELMAN: Is this going to be 14 somehow relevant to the sexual harassment complaint 15 and retaliation complaint? Because if it's not, I'm 16 going to direct him not to answer. I think we've 17 had enough defamation of people that are nonparty 18 witnesses. 19 MR. GOODMAN: Yes, it is directly 20 relevant. 21 MS. KAPPELMAN: If it's not, I'm 22 warning you, I really am going to the judge about 23 your defaming nonparty witnesses. 24 So somebody -- Mr. Stark got drunk, 25 Matt. Did Chris Stark ever get drunk?</p> <p style="text-align: right;">Page 171</p>	<p>1 MS. KAPPELMAN: Object to the form of 2 the question. 3 Again, is this going to be relevant to 4 the sexual harassment claims in this case, or is it 5 just disparagement? 6 BY MR. GOODMAN: 7 Q. The Schmitz/Konicki incident and the 8 Stark/Bell incident, any other instances -- 9 MS. KAPPELMAN: Well, those aren't 10 aggressions, so -- 11 BY MR. GOODMAN: 12 Q. Any other instances where one person 13 purported to kiss another against their consent? 14 A. Not that I remember. 15 Q. When did you find out that Emily had been 16 terminated? 17 MS. KAPPELMAN: Object to the form of 18 the question. 19 You can answer. When did you find 20 that Emily left? 21 A. It would have been the morning of the -- 22 was it the 23rd or 24th, was when I found out she 23 had left. 24 Q. The day that she was going to Atlanta? 25 A. The day that I was told that she resigned</p> <p style="text-align: right;">Page 173</p>

<p>1 the company.</p> <p>2 Q. Okay. Well, she didn't resign --</p> <p>3 MS. KAPPELMAN: Object to the form of</p> <p>4 the question. She did resign. You can't</p> <p>5 characterize what --</p> <p>6 MR. GOODMAN: Counsel, Counsel,</p> <p>7 Counsel --</p> <p>8 MS. KAPPELMAN: You can't tell him</p> <p>9 what she did or didn't do.</p> <p>10 MR. GOODMAN: You wouldn't be able to</p> <p>11 do it at trial; you shouldn't do it in the</p> <p>12 deposition.</p> <p>13 MS. KAPPELMAN: You cannot</p> <p>14 characterize whether she resigned or not.</p> <p>15 BY MR. GOODMAN:</p> <p>16 Q. Did you see her -- I think you've already</p> <p>17 testified you saw her on the last full day she was</p> <p>18 in the office. Is that correct? The 23rd?</p> <p>19 A. No. I think it was on the Thursday that</p> <p>20 week, which -- I'm not sure what date that would</p> <p>21 have been.</p> <p>22 Q. The Thursday of the prior week?</p> <p>23 A. Yes, sir. I believe she took that Friday</p> <p>24 off.</p> <p>25 Q. And you were working in the same facility</p> <p style="text-align: right;">Page 174</p>	<p>1 professionals not working well together, is how I</p> <p>2 interpreted it.</p> <p>3 Q. Did you tell him that the concern of Emily</p> <p>4 was that he was being aggressive?</p> <p>5 A. I don't remember, sir.</p> <p>6 Q. But that was the nature of the request that</p> <p>7 was made to you, to talk to him about his being</p> <p>8 aggressive; correct?</p> <p>9 A. Yes. But I think I also involved Kory in</p> <p>10 that discussion. I think Kory may have had that</p> <p>11 call.</p> <p>12 Q. On August 27, 2019 -- well, your group</p> <p>13 could use Slack as an internal texting device; right?</p> <p>14 A. Yes.</p> <p>15 Q. On August 27, 2019, in a Slack message, you</p> <p>16 made a joke about people going to HR; correct?</p> <p>17 A. I don't remember. Do you have it? You</p> <p>18 could it pull up, and I can remember it.</p> <p>19 Q. I don't know that I do.</p> <p>20 You're not denying that, but you just don't</p> <p>21 remember it?</p> <p>22 A. I don't remember the context.</p> <p>23 Who did I say it to?</p> <p>24 Q. It was on a team Slack. That's all I can</p> <p>25 tell you right at this point.</p> <p style="text-align: right;">Page 176</p>
<p>1 as her on the 23rd, the next Monday?</p> <p>2 A. I think I would have been. I can't</p> <p>3 remember. I traveled 100-plus days a year last year.</p> <p>4 I think I was in the office that day.</p> <p>5 Q. You just don't remember?</p> <p>6 A. No, I don't remember where I was on the</p> <p>7 23rd.</p> <p>8 Q. Did you have any interaction with her on</p> <p>9 the 23rd?</p> <p>10 A. Not that I remember.</p> <p>11 Q. Mr. Witte?</p> <p>12 A. What did you say?</p> <p>13 Q. You don't remember having any interaction</p> <p>14 with her on the 23rd?</p> <p>15 A. It was either -- it was either on the 19th</p> <p>16 or the 23rd. I said, "Hi, Emily" when I passed her</p> <p>17 upstairs, and that was the extent of my conversation</p> <p>18 with her.</p> <p>19 Q. On August 4th, did Ms. Forsythe ask you to</p> <p>20 talk to Mr. McDole about being aggressive --</p> <p>21 August 4, 2019 -- before she made her formal</p> <p>22 complaint?</p> <p>23 A. I think there -- there was an email, if I</p> <p>24 remember, and I called Mike. And it was -- it was --</p> <p>25 you can mark it as aggressive or -- it was two</p> <p style="text-align: right;">Page 175</p>	<p>1 MS. KAPPELMAN: Object to the form of</p> <p>2 the question.</p> <p>3 A. I don't remember.</p> <p>4 Q. It would not be appropriate for you, as a</p> <p>5 supervisor, or really anybody at Wayfair, to make fun</p> <p>6 of somebody who complained to HR; correct?</p> <p>7 A. No.</p> <p>8 Q. You would agree with that?</p> <p>9 A. Yes, I would agree. I would not do that.</p> <p>10 Q. Would it have been okay for Mr. McDole to</p> <p>11 treat any female other than Emily Forsythe the way</p> <p>12 she said he did?</p> <p>13 MS. KAPPELMAN: Object to the form of</p> <p>14 the question. I don't even know what you're asking.</p> <p>15 But, Matt, try. If you understand the</p> <p>16 question, go ahead and answer.</p> <p>17 A. If you're saying the way that Emily</p> <p>18 described the interaction with Mike, would that be</p> <p>19 appropriate with any employee at Wayfair -- is that</p> <p>20 your question?</p> <p>21 No. That would be inappropriate.</p> <p>22 Q. And I know your daughter is young. But if</p> <p>23 your daughter was in the workforce or if your wife --</p> <p>24 MS. KAPPELMAN: No. You're not asking</p> <p>25 that question. Move on. Move on.</p> <p style="text-align: right;">Page 177</p>

<p>1 MR. GOODMAN: What's wrong with the 2 question, Counsel?</p> <p>3 MS. KAPPELMAN: You're not asking it. 4 You want to go in front of a judge? I'm happy to. 5 You're not going to talk about Mr. Witte's daughter.</p> <p>6 Now, if you have any new questions that 7 are relevant to sexual harassment, go ahead and ask 8 them. We're already a half an hour over with this 9 witness, and I'd really like to terminate so we can 10 take 15 minutes off before the next deposition.</p> <p>11 So if you only have questions about 12 Ms. Witte's family members, hopefully we're done.</p> <p>13 BY MR. GOODMAN:</p> <p>14 Q. Did you ever ask Mr. McDole specifically 15 about the incidents on January 22nd, March 13th, and 16 March 14th that involved him sitting next to her when 17 he originally was not sitting next to her, and that 18 involved him asking her to dinner without the 19 pretense of it being work-related? Did you ever 20 specifically speak about those to Mr. McDole?</p> <p>21 MS. KAPPELMAN: Talking about the 22 allegations in the complaint. Did you ever address 23 the allegations that Ms. Forsythe made?</p> <p>24 A. The only thing I ever asked of Mike -- 25 after the newspaper article came out, I asked Mike if</p> <p style="text-align: right;">Page 178</p>	<p>1 no idea if it was one-sided. Only the two of them 2 do.</p> <p>3 Q. Did you ever tell Emily that you thought 4 Mr. McDole was unable to control himself when he 5 attacked her?</p> <p>6 A. Maybe. I think I might have said something 7 like that, but it was -- it was because he was really 8 upset with how he felt he was being portrayed and 9 worked with, which is why I asked her to leave the 10 room. And uncontrolled wasn't, like, throwing 11 chairs, it was raising voice. And he said he was 12 pissed off.</p> <p>13 Q. Okay. Who is Jim Lowe?</p> <p>14 A. Jim Lowe is our western region maintenance 15 leader.</p> <p>16 Q. Did you ever talk to Mr. Lowe about 17 Mr. McDole?</p> <p>18 A. Yes. I think -- I think after the 19 incidents.</p> <p>20 Q. Did you talk with him about his statement 21 to Emily that McDole was trying to sabotage her 22 career at Wayfair?</p> <p>23 A. I did talk to him about that.</p> <p>24 Q. And what was the substance of the 25 conversation on both sides?</p> <p style="text-align: right;">Page 180</p>
<p>1 he was okay, and he said he was okay. That was the 2 extent of our conversations on the case.</p> <p>3 Q. After the what came out?</p> <p>4 MS. KAPPELMAN: The newspaper article. 5 When you called the newspaper, Bob, about your 6 lawsuit.</p> <p>7 BY MR. GOODMAN:</p> <p>8 Q. So you never spoke to him about these 9 incidents until 2020; correct?</p> <p>10 A. I've still not spoken to Mike in detail 11 about any of these alleged incidents.</p> <p>12 Q. Did you ever speak to him about emails 13 concerning -- to or concerning Emily between April 14 2019 and August 2019 that Emily complained were 15 unprofessionally aggressive?</p> <p>16 A. Yes. And I would -- I would talk to him 17 about those, and he would tell me all the things that 18 he had problems with. It wasn't a one-sided story, 19 that Mike was just hostile towards Emily. It went 20 both ways.</p> <p>21 Q. Well, the unconsented touching was one 22 direction, though; right?</p> <p>23 MS. KAPPELMAN: Object to the form of 24 the question.</p> <p>25 A. In Emily's email, it was one-sided. I have</p> <p style="text-align: right;">Page 179</p>	<p>1 A. The substance from that was that that was 2 not exactly what Jim said Mike said. It wasn't that 3 he was directly trying to sabotage her career.</p> <p>4 Emily, I remember talking to you about this 5 a while ago. I actually have a hard time 6 recollecting this -- Emily Miller. I'm not trying to 7 pull you into it, but I'd have to refresh myself on 8 the conversation. I don't remember.</p> <p>9 It wasn't the one-sided that he was trying 10 to sink her career, though, as the way it's stated. 11 It was more of a -- he was having difficulty working 12 with her.</p> <p>13 MR. GOODMAN: Okay. Well, objection to 14 responsiveness.</p> <p>15 BY MR. GOODMAN:</p> <p>16 A. Did you understand that Mr. McDole -- the 17 claim was that Mr. McDole said he was willing to 18 sabotage her career -- (indecipherable).</p> <p>19 (Clarification requested by the court 20 reporter.)</p> <p>21 MS. KAPPELMAN: Ask the last question, 22 and then we're ending this deposition. So go ahead.</p> <p>23 MR. GOODMAN: Counsel --</p> <p>24 MS. KAPPELMAN: You're already 35 25 minutes over.</p> <p style="text-align: right;">Page 181</p>

<p>1 MR. GOODMAN: I'm accommodating you by 2 trying to do two of them today. Give me a break. 3 MS. KAPPELMAN: You're not 4 accommodating me. You're already 35 minutes over. 5 MR. GOODMAN: Counsel, this is not the 6 first time you've had something like that happen. 7 Give me a break. 8 MS. KAPPELMAN: It's not. But we're 9 all sitting here waiting for you to finish, and you 10 keep going over stuff you've already gone over. 11 BY MR. GOODMAN: 12 Q. Did you understand Mr. Lowe to have told 13 Emily that it was his opinion that McDole was trying 14 to sabotage her career as opposed to McDole 15 threatening that? 16 A. What I remember of this conversation was 17 that Emily stated Jim said that Mike was trying to 18 sabotage her career. When I called Jim directly, he 19 said that's not what happened. It was not that 20 aggressive. 21 Q. Is that the only conversation you had about 22 the subject with Jim Lowe? 23 A. I called Jim back in -- I don't remember 24 exactly when. December or January, something like 25 that. And he was on vacation, and I spoke to him for</p> <p style="text-align: right;">Page 182</p>	<p>1 Q. Okay. Did you yourself ever confirm any of 2 the allegations that Ms. Forsythe made against 3 Mr. McDole of nonconsensual touching? 4 A. No, I did not. 5 MR. GOODMAN: Object to the form. 6 BY MS. KAPPELMAN: 7 Q. So as you sit here today, do you know 8 whether they were true or not? 9 A. I do not. 10 MS. KAPPELMAN: Okay. Nothing further. 11 EXAMINATION 12 BY MR. GOODMAN: 13 Q. Mr. Witte, have you read Ms. Forsythe's 14 deposition transcript? 15 A. No, I have not. 16 Q. Have you listened to any recording of a 17 conversation with Mr. Shaffer? 18 A. No. 19 Q. Have you reviewed correspondence from 20 Mr. Shaffer sent on September 23, 2019, to 21 Ms. Forsythe? 22 A. No. 23 Q. Did you ever hear of or get any notice, 24 written notice, of resignation from Ms. Forsythe in 25 September of 2018?</p> <p style="text-align: right;">Page 184</p>
<p>1 about 10 minutes. 2 Q. Did you ever talk with... 3 MR. GOODMAN: Pass the witness. 4 EXAMINATION 5 BY MS. KAPPELMAN: 6 Q. During the course of this deposition, 7 Counsel has repeatedly said that Emily Forsythe was 8 terminated by Wayfair. 9 Do you understand that she was terminated 10 or that she resigned, Mr. Witte? 11 MR. GOODMAN: Objection. 12 A. I understand that Emily asked Trevor for 13 a -- I understand, from the conversation with Trevor, 14 that Emily said, where do we go from here -- or 15 Trevor said, "Where do we go from here?" 16 And Emily said something about, "I'd like a 17 package," is what I understand. 18 Q. And was that in keeping with her 19 discussions with you about looking for work elsewhere 20 outside of Wayfair? 21 MR. GOODMAN: Object to the form. 22 MS. KAPPELMAN: You can answer, Matt. 23 A. She had told me prior to that, a few weeks 24 prior, that she was looking at outside companies 25 besides Wayfair.</p> <p style="text-align: right;">Page 183</p>	<p>1 A. No. 2 Q. Did anybody ever tell you about any notice 3 period related to the separation of Ms. Forsythe's 4 employment either by involuntary termination or 5 resignation? 6 A. There was a thudding in the background. 7 I'm sorry. Can you repeat that? 8 Q. Did anybody at Wayfair ever tell you that 9 there was a notice period tied to either any 10 resignation or termination of Ms. Forsythe? A notice 11 period. 12 A. No. Not that I remember. 13 Q. And you've heard of notice periods in 14 connection with people resigning as of two weeks 15 hence or being terminated as of that future date; 16 correct? 17 MS. KAPPELMAN: Object to the form. 18 You can answer if you know. 19 A. I've heard of both. I've heard of people 20 resigning and packing their bags and leaving 21 immediately; I've heard two-week notice periods; I've 22 heard six-week notice periods. 23 Q. And you didn't hear about any of those in 24 connection with Ms. Forsythe; correct? 25 A. I heard Ms. Forsythe had resigned effective</p> <p style="text-align: right;">Page 185</p>

<p>1 immediately.</p> <p>2 Q. She resigned on -- what you heard was she</p> <p>3 resigned effective immediately on September 19th? Is</p> <p>4 that what you're saying?</p> <p>5 A. I don't think it was September 19th. I</p> <p>6 would say it was the 23rd or 24th.</p> <p>7 Q. Okay. But she worked -- she worked on the</p> <p>8 23rd, so you're saying the resignation was delivered</p> <p>9 after the last day she worked or on the last day she</p> <p>10 worked?</p> <p>11 A. I wasn't in the room for the resignation</p> <p>12 discussion.</p> <p>13 Q. Okay.</p> <p>14 A. Everything you're asking me is --</p> <p>15 Q. You know the last day was the day before</p> <p>16 she was scheduled to go to Atlanta for a business</p> <p>17 trip; correct?</p> <p>18 A. I guess you made me aware of that, and I</p> <p>19 heard that before.</p> <p>20 Q. Okay. And are you saying that you were</p> <p>21 told she resigned on that day before she was going to</p> <p>22 Atlanta?</p> <p>23 A. Yes.</p> <p>24 Q. Who told you that?</p> <p>25 A. Internal counsel, Mike Berendt.</p> <p style="text-align: right;">Page 186</p>	<p>1 I, Kristen C. Krakofsky, court reporter and</p> <p>2 notary public in and for the Commonwealth of</p> <p>3 Massachusetts, certify:</p> <p>4 That the foregoing proceedings were taken</p> <p>5 before me at the time and place herein set forth, at</p> <p>6 which time the witness was properly identified by</p> <p>7 means of an Ohio driver's license and put under oath</p> <p>8 by me;</p> <p>9 That the testimony of the witness, the</p> <p>10 questions propounded, and all objections and</p> <p>11 statements made at the time of the examination were</p> <p>12 recorded stenographically by me and were thereafter</p> <p>13 transcribed;</p> <p>14 That the foregoing is a true and correct</p> <p>15 transcript of my shorthand notes so taken.</p> <p>16 I further certify that I am not a relative</p> <p>17 or employee of any of the parties, nor am I</p> <p>18 financially interested in the action.</p> <p>19 I declare under penalty of perjury that the</p> <p>20 foregoing is true and correct.</p> <p>21 of August, 2020.</p> <p>22 </p> <p>23 Kristen Krakofsky, Notary Public</p> <p>24 My commission expires October 25, 2024.</p> <p>25</p> <p style="text-align: right;">Page 188</p>
<p>1 Q. Did he tell you whether it was written or</p> <p>2 oral on the 23rd?</p> <p>3 MS. KAPPELMAN: I'm going to direct you</p> <p>4 not to answer to the extent that you had conversation</p> <p>5 with internal counsel. You've already divulged too</p> <p>6 much, so -- that's privileged communications.</p> <p>7 If you have anything else you want to</p> <p>8 ask him that's not privileged communications, go</p> <p>9 ahead, Bob.</p> <p>10 MR. GOODMAN: No further questions.</p> <p>11 MS. KAPPELMAN: No further questions.</p> <p>12 You're done, Matt.</p> <p>13 THE VIDEOGRAPHER: This concludes the</p> <p>14 deposition. The time is now 2:39.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">Page 187</p>	<p>1 Emily Forsythe v. Wayfair</p> <p>2 Matthew Witte Job No. 4184620</p> <p>3 E R R A T A S H E E T</p> <p>4 PAGE____ LINE____ CHANGE_____</p> <p>5 _____</p> <p>6 REASON_____</p> <p>7 PAGE____ LINE____ CHANGE_____</p> <p>8 _____</p> <p>9 REASON_____</p> <p>10 PAGE____ LINE____ CHANGE_____</p> <p>11 _____</p> <p>12 REASON_____</p> <p>13 PAGE____ LINE____ CHANGE_____</p> <p>14 _____</p> <p>15 REASON_____</p> <p>16 PAGE____ LINE____ CHANGE_____</p> <p>17 _____</p> <p>18 REASON_____</p> <p>19 PAGE____ LINE____ CHANGE_____</p> <p>20 _____</p> <p>21 REASON_____</p> <p>22 _____</p> <p>23 _____</p> <p>24 Matthew Witte Date _____</p> <p>25</p> <p style="text-align: right;">Page 189</p>